

Dealing with Fragile States –
The Law and Practice of International Development Organizations

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Introduction

Statehood matters in development cooperation, and so does state fragility. The provision of financial aid by states or international organizations to developing countries depends on two basic conditions: a state must exist, and it needs an authorized and competent government. International organizations require government counterparts with the capacity to express consent and to legally commit a country. The transfer of financial aid is contingent on national governments having the capacity to meet specific requirements and to assume responsibility in the development process. In the large number of fragile states that are characterized by weak institutions and poor governance, the lack of a government with both legal and factual capacity can thus significantly complicate, delay, and even prevent development cooperation – in places with the most urgent needs.¹

When South Sudan became the world's youngest state in July 2011, the country had some of the world's lowest development indicators: half of the population had no access to drinking water, and chances of dying in child birth were higher than completing school for 15-year-old girls.² International development organizations like the World Bank sought to assist in building the new state from scratch.³ To ensure that its resources were used effectively and meet development objectives, however, the World Bank also insisted that the nascent government fulfills largely the same bulk of requirements as any other state requesting financing.⁴ With few institutions actually in place and functioning, South Sudan was expected to have a reasonably effective public financial management system, a national framework for the attainment of environmental and social standards, and of course the ability to plan and

¹ There is no agreed definition of fragile states. A typical example and frequent reference is the definition of the OECD: "A fragile region or state has weak capacity to carry out basic governance functions, and lacks the ability to develop mutually constructive relations with society." OECD, *'Fragile States 2013. Resource Flows and Trends in a Shifting World'* (2013), 15. In its "Harmonized List of Fragile Situations" for 2015-2016, the World Bank counts 34 countries and one territory (the West Bank & Gaza) as fragile. See online: <http://pubdocs.worldbank.org/pubdocs/publicdoc/2015/7/700521437416355449/FCSlist-FY16-Final-712015.pdf> (accessed August 2015). For more on the definition of fragile states, see chapter I.1.

² THE WORLD BANK, *'South Sudan - Interim Strategy Note for FY2013-2014'* (2013), paras. 17-22.

³ I refer to international development organizations as international organizations that provide Official Development Assistance (ODA), which includes organizations that do not have an exclusive development mandate, such as the European Union. On the definition of ODA, see *infra* note 51.

⁴ E.g. GREG LARSON, et al., Harvard Center for International Development (CID) Working Paper No. 268, *'South Sudan's Capability Trap: Building a State with Disruptive Innovation'* (October 2013), 29, criticizing the World Bank's unrealistic fiduciary and contracting requirements under the Multi-Donor Trust Fund for South Sudan.

implement development projects. In short: Before the World Bank assists in building state institutions, it requires a certain level of institutional capacity on the part of the state.

South Sudan is not the only example where the discrepancy between a state's formal legal status and its actual capacity complicated development cooperation in manifold ways. Most post-conflict countries like Kosovo, East-Timor, Afghanistan, and Iraq, went through a period where an official government had yet to emerge and develop the type of institutions and administrative capacity that are usually prerequisites for the transfer of financial aid. Somalia had no functioning government for a period of twelve years – and thus no entity authorized to even request assistance from the African Development Bank, or ratify the Cotonou Agreement, the basis for aid from the European Union.⁵

Looking at development cooperation with fragile states, a problem thus becomes concrete that goes to the heart of international law. Public international law knows only states and non-states, and operates on the formal premise that all states have an 'effective government'.⁶ This formal premise does not correspond to a reality in which many entities with the legal status of states are actually unable to fulfill even most basic functions. The counterfactual nature of juridical statehood and the principle of sovereign equality thus mask a fundamental problem that state fragility can pose to the functioning and effectiveness of the international legal order. It crucially depends on the existence of states and governments with the minimum level of institutional and administrative capacity necessary to exercise rights and obligations, and to partake in international cooperation.

While international law has principally remained blind to the actual differences between equal sovereigns, this thesis demonstrates that international development organizations, which operate on its premise and within its confines, have not. Arguably, development cooperation has always been concerned with strengthening the effectiveness of government (and governance) in recipient countries.⁷ As subjects

⁵ In contrast, Somaliland, an autonomous region within Somalia claiming independence, has established a government determined to lead its own development. Not being recognized as independent state, Somaliland could nevertheless receive no direct support from international development organizations.

⁶ The existence of an effective government is the central, defining criterion of statehood under international law. JAMES CRAWFORD, *The Creation of States in International Law*, 2nd Edition (Clarendon Press, 2007), 42; and *infra* chapter I.3 a).

⁷ The emphasis on the role of the state in development cooperation has been varying since the 1950s. For an overview, see FRANCIS FUKUYAMA, *State-Building. Governance and World Order in the 21st*

of international law, however, development organizations also operate on the basis of rules that presuppose the existence of an effective government. The lack of a government with both legal and factual capacity can thus stand in the way of assisting fragile states and their populations – a problem that has attracted increasing attention since latent fragmentation and overt crises in fragile states have become a key concern for the international donor community.

In this thesis, I argue that international development organizations have therefore adapted rules that govern the provision of development aid, adapted to reflect the lack or severe limitation of government effectiveness in fragile states. By analyzing the mostly internal rule-making activities of the World Bank and a range of regional organizations in comparison, I show how a differentiated approach to dealing with fragile states has been implemented in the law of development cooperation – with significant effects on the rights and obligations accorded to fragile states in the development process.⁸ Exploring the case of international development organizations holds a broader relevance. It proves how in the actual practice of international cooperation, state fragility has triggered a legal response – with all the potentials and perils involved where international organizations address a problem that based on the principle of sovereign equality, international law deliberately neglects.

1. Objectives and Significance

This thesis was born out of the observation that fragile states are a phenomenon beyond law, but how international development organizations have addressed the challenges of engaging with fragile states may well be of legal significance. There is a large gap between the positivist assertion that variations of government effectiveness have no bearing under international law, and an often messy reality in which international organizations seek to respond to the practical and legal challenges of engaging with countries that have very weak or no government. The ensuing response of international development organizations should interest legal scholars, because it involves the use of formal and informal legal instruments and concerns the rights and obligations accorded to fragile states. At the same time, in the practice of

Century (Cornell University Press, 2004), pp. 1-42, and the references provided in *infra* note 283. I describe the state-centric paradigm of development cooperation in *infra* chapter II.2 a).

⁸ On the law of development cooperation as defined by Dann, see *infra* note 51.

development cooperation, the legal dimension of the challenges of dealing with fragile states is often not fully considered. A general understanding of the regulatory approaches and instruments that different organizations have used, or could use, to better address these challenges is missing.

Accordingly, this thesis pursues three main objectives. The first objective is to shed light on a phenomenon that has largely escaped the grasp of legal scholars, although (or because) it concerns international law's very foundations.⁹ International law defines the state as a constant, not a variable. It is concerned with the effectiveness of governments when considering the emergence and discontinuity of states, but not with the evolution of their effectiveness.¹⁰ The counterfactual nature of international law's conception of statehood and sovereignty serve an important purpose: to prevent material inequality and factual power discrepancies from translating into law, and hence to protect national autonomy and self-determination.¹¹ State fragility may therefore be an empirical phenomenon, but it is deliberately no legal concept.

Yet, the discrepancy between the formal legal status of a state and its factual capacity – between juridical statehood and empirical statehood – undoubtedly poses a problem to the decentralized international legal order.¹² It relies on states having the capacity to exercise rights and obligations, and to implement international law domestically.¹³ In essence, international law does not only presume, but also require

⁹ A limited number of articles and books deal with the phenomenon of state failure from a legal perspective, mostly with a focus on the complete breakdown of government. See, for instance, the early study of DANIEL THÜRER, 'Der Wegfall effektiver Staatsgewalt: "The failed state"', 34 *Berichte der Deutschen Gesellschaft für Völkerrecht*, 9 (1996); Geiß' monograph ROBIN GEIß, *Failed States. Die normative Erfassung gescheiterter Staaten* (Duncker & Humblot, 2005); and in English, RIKKA KOSKENMÄKI, 'Legal Implications Resulting from State Failure in Light of the Case of Somalia', 73 *Nordic Journal of International Law*, 1 (2004); and CHIARA GIORGETTI, *A Principled Approach to State Failure. International Community Actions in Emergency Situations* (Brill, 2010). For a review of the relevant literature, see MARIE VON ENGELHARDT, 'Die Völkerrechtswissenschaft und der Umgang mit Failed States. Zwischen Empirie, Dogmatik und postkolonialer Theorie', 2 *Verfassung und Recht in Übersee*, 222 (2012); and *infra* chapter I.3 a).

¹⁰ CRAWFORD, *The Creation of States in International Law*, Part 1; GERARD KREIJEN, *State Failure, Sovereignty and Effectiveness. Legal Lessons from the Decolonization of Sub-Saharan Africa* (Nijhoff, 2004), chapter 4.

¹¹ MARTTI KOSKENNIEMI, 'The Wonderful Artificiality of States', 88 *Proceedings of the Annual Meeting (American Society of International Law)*, 22 (1994).

¹² The terms "juridical statehood" and "empirical statehood" were coined by International Relations scholars Jackson and Rosberg in their influential work on "quasi-states". See ROBERT H. JACKSON & CARL G. ROSBERG, 'Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood', 35 *World Politics*, 1 (1982).

¹³ E.g. JONATHAN E. HENDRIX, 'Law Without State: The Collapsed State Challenge to Traditional International Enforcement', 24 *Wisconsin International Law Journal*, 587 (2006). For further references, see *infra* note 189.

states with an effective government, which thus becomes a precondition for the functioning and effectiveness of in fact all international legal regimes.

While the ensuing problems are widely acknowledged, international legal scholarship has generally limited itself to studying the legal consequences of a complete breakdown of government, like in Somalia.¹⁴ In contrast, the phenomenon of state fragility, which encompasses effectiveness deficits that fall short of a complete government breakdown, is certainly more difficult to grasp. Fragile states, however, can equally challenge the functioning and effectiveness of legal regimes, if they lack the capacity to participate in intergovernmental fora of decision-making, to comply with an increasing reach and depth of international regulation, and to give real effect to the commitments they enter into.¹⁵ At the same time, with some 30-50 countries considered as fragile, state fragility has far more real world significance than rare incidents of state collapse.¹⁶

This thesis therefore aims to illustrate the concrete challenges that dealing with fragile states poses to the subjects of a state-centric international legal order, and to the functioning of international legal regimes. By analyzing the regulatory activity of international development organizations, I seek to highlight that such challenges are already being addressed in practice – and not just *ad hoc*, but involving the use of formal and informal legal rules to consolidate and formalize a differentiated approach to dealing with fragile states. Ultimately, a look at the actual position that fragile states are accorded could yield more shades of gray than the formal conception of sovereign statehood – the neat picture of internal authority and external equality – suggests.¹⁷ As Joseph Weiler already hypothesized: “the international community and

¹⁴ *Supra* note 9. Also CHIARA GIORGETTI, 'International Norms and Standards Applicable to Situations of State Fragility and Failure: An Overview', in Hassane Cissé, et al. (eds), *The World Bank Legal Review. Volume 3. International Financial Institutions and Global Legal Governance* (The World Bank, 2012), 264: “A rigorous analysis of the legal implications, significance, and consequences of state fragility is – despite its importance – missing.”

¹⁵ Stefan Oeter therefore calls on international legal scholars to devote more attention to the study of “precarious statehood”. STEFAN OETER, 'Regieren im 21. Jahrhundert: Staatlichkeit und internationales System', in Stefani Weiss & Joscha Schmierer (eds), *Prekäre Staatlichkeit und Internationale Ordnung* (Verlag für Sozialwissenschaften, 2007), 81-83. For a broader look at variations of state effectiveness and the consequences of inherent weakness, see also KREIJEN, *State Failure, Sovereignty and Effectiveness. Legal Lessons from the Decolonization of Sub-Saharan Africa*.

¹⁶ The number of countries designated as fragile depends on what criteria and methodology are used. A common reference point is the World Bank’s “Harmonized List of Fragile Situations” (*supra* note 1). The OECD used to add countries that are also included in the Fragile States Index of the Fund for Peace, available online at <http://fsi.fundforpeace.org> (accessed August 2015).

¹⁷ To be sure, unlike the legal status of statehood, the “the extent of powers, rights and responsibilities of any entity is to be determined only by examination of its actual position” – and may well be a matter of degree. CRAWFORD, *The Creation of States in International Law*, 44.

international law in certain circumstances contemplate an evolving legal reality of statehood”.¹⁸

To existing legal scholarship on statehood and state ‘failure’, this thesis thus adds in multiple ways. I first extend the scope of analysis from rare incidents of complete government breakdown, and provide a more nuanced doctrinal understanding of the broader spectrum of limited government effectiveness. By putting the focus on the concrete challenges associated with dealing with fragile states, I move beyond the often abstract and isolated engagement of legal scholars with the meaning of state failure, or its consequences for the application of established legal concepts. Perhaps most importantly, I demonstrate the need for legal scholars to analyze what position fragile states are accorded by other legal subjects, in different legal regimes – and therefore to consider rules that may not always form part of the traditional sources of international law, but can nonetheless have significant effects on the countries concerned.

This thesis is not only about fragile states, however, but about development cooperation with fragile states. After all, it is in the practice of development cooperation with fragile states that the discrepancy between juridical statehood and empirical statehood comes to bear, with potentially severe consequences. It is in development cooperation that the question of how to deal with countries that have the legal status of states, but very weak factual capacities, is of particular practical relevance. And, importantly, it is here where we observe how international organizations have sought to address the challenges of engaging with fragile states in an increasingly systematic and formalized way, adapting rules that inform the allocation, planning, and implementation of aid.

My second objective is therefore to highlight an important, legal dimension to the challenges of aiding fragile states, which has so far received little attention in the relevant academic or policy-oriented literature.¹⁹ Traditional development cooperation

¹⁸ JOSEPH H. H. WEILER, 'Editorial. Differentiated Statehood? 'Pre-States'? Palestine@the UN', 24 *European Journal of International Law*, 1 (2013), 5.

¹⁹ There is a vast literature on the characteristics of fragile states, the challenges of development cooperation with fragile states, and the consequences for development policy-making. For a preliminary overview of the relevant literature, see, for instance, LARS ENGBERG-PEDERSEN, et al., Danish Institute for International Studies, DIIS Report 9, '*Fragile Situations. Current Debates and Central Dilemmas*' (2008); CLAIRE MCLOUGHLIN, Governance and Social Development (GSD) Resource Center, '*Topic Guide on Fragile States*' (2010); and with a focus on the emerging policy response of donor states and organizations, the special issue of Conflict Security & Development, Vol. 12, Issue 5, 2012. In detail, see *infra* chapters I.2 b) and II.2.

is state-centric: it primarily consists of an intergovernmental process, whereby donor states or international organizations provide financial and technical assistance to recipient states.²⁰ Counterparts in recipient states are thus national governments, which are expected to take the lead and ‘own’ the development process.²¹ For based on the current aid orthodoxy, not only a certain level of institutional capacity and good governance on the parts of recipient countries, but also commitment to assume ownership are generally seen as preconditions for aid to be effective.²² Such conditions are often not met in the weak-capacity, conflict-affected and politically charged environments associated with fragile states.

While there is a vast literature on the factors that make aiding fragile states challenging,²³ one basic dimension has often been overlooked in the academic discourse, or perhaps taken for granted.²⁴ International development organizations must treat recipient countries as legal sovereigns: They need a government counterpart that can formally request their engagement, and negotiate and sign the international legal agreements on the basis of which they provide assistance.²⁵ Moreover, development organizations operate on the basis of a legal agreement

²⁰ I thus consider only the provision of ODA by governments or international organizations, and not assistance provided by non-public entities such as Non-Governmental Organizations (NGOs), or private businesses. On the definition of ODA and the understanding of development cooperation underlying this thesis, see *infra* note 51.

²¹ The principle of ownership is most prominently captured in the Paris Declaration on Aid Effectiveness of March 2005 (hereinafter Paris Declaration), in which donors committed to basic principles to improve the quality and effectiveness of aid, including ownership of developing countries and alignment of donors behind their objectives. In detail, see *infra* chapter II.2 a).

²² Burnside and Dollar prominently argue that there is a positive correlation between sound institutions and economic growth: C. BURNSIDE & D. DOLLAR, 'Aid, Policies, and Growth', 90 *American Economic Review*, 847 (2000). Although their findings have been challenged (*infra* note 287), there is a perceptible trend in the practice of development cooperation towards supporting states that have an institutional structure capable of absorbing and implementing aid, and that are committed to good governance.

²³ E.g. PAUL COLLIER, *The Bottom Billion. Why the Poorest Countries are Failing and What Can Be Done About It* (Oxford University Press, 2007); from a policy-oriented perspective, MICHAEL ANDERSON & MAGÜI MORENO TORRES, UK Department for International Development, PDRE Working Paper 1, 'Fragile States: Defining Difficult Environments for Poverty Reduction' (August 2004); and with examples of the dilemmas facing external actors, TOBIAS DEBIEL, et al., Development and Peace Foundation, Policy Paper 23, 'Between Ignorance and Intervention. Strategies and Dilemmas of External Actors in Fragile States' (2005).

²⁴ I am aware only of one brief discussion in JOANNA MACRAE, et al., Overseas Development Institute, 'Aid to 'Poorly Performing' Countries: A Critical Review of Debates and Issues' (July 2004), at pp. 43-45.

²⁵ As international legal subjects, international organizations are bound to respect customary principles of international law, including the fundamental principle of sovereign equality enshrined in the UN Charter, Article 2 (1). See, for instance, DANIEL BRADLOW, 'International Law and the Operations of the International Financial Institutions', in Daniel Bradlow & David Hunter (eds), *International Financial Institutions and International Law* (Kluwer, 2010), at 11-25; and in more detail, PHILIPP DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany* (Cambridge University Press, 2013), pp. 238-258.

themselves, the founding treaty, which determines for what purposes and under what conditions they can engage with a country. Most organizations are thus bound to ensure that the resources they provide are used effectively and support development objectives.²⁶ They hence establish an array of substantive and procedural requirements that recipient governments must meet in order to receive aid – which demands a certain level of institutional and administrative capacity.²⁷ Even aid orthodoxies like the ownership principle are regularly incorporated in the rules that guide the conduct of international development organizations, which are committed to accord a decisive role to recipient governments in the development process.²⁸

Accordingly, not alone factors like insecurity, weak capacity, or poor governance make fragile states a particularly challenging environment for development cooperation.²⁹ Rather, an intricate blend of technical considerations, political concerns, and legal issues come together. For international development organizations are concerned with strengthening the effectiveness of governments in developing countries, but they equally operate on the basis of rules that presume the existence of effective government counterparts.³⁰ It is those rules that can significantly complicate, delay, or even prevent development assistance in the absence of a government with legal and basic factual capacity – eventually depriving a population of urgently needed assistance. After all, fragile states lag far behind other countries in achieving the Millennium Development Goals (MDGs).³¹ How do development organizations engage in situations where no official government exists? How do they assist countries that lack the minimum capacity required to qualify for aid, let alone to assume ownership of the development process? And how do they ensure that aid is nonetheless effective?

²⁶ In detail, see *infra* chapter III.2; or DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 284-295.

²⁷ I provide examples of such requirements in *infra* chapter II.2 a), and elaborate their legal nature and effects in *infra* chapter III.2.

²⁸ DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 241-244; PHILIPP DANN & JULIA SATTELBERGER, 'Verrechtlichung in der Entwicklungszusammenarbeit: Zur normativen Verdichtung des Prinzips der Eigenverantwortung', in Aram Ziai (ed) *Im Westen nichts Neues? Stand und Perspektiven der Entwicklungstheorie* (Nomos, 2014).

²⁹ Such factors are well researched (*supra* note 23).

³⁰ In contrast to international law, where it is not clear what precisely the 'effective government' criterion requires, the level of capacities and type of institutions required from recipient governments in development cooperation is more defined – and more demanding. For a discussion of what effective government entails for international development organizations, see *infra* chapter II.2 a).

³¹ OECD, *Fragile States 2014. Domestic Revenue Mobilization in Fragile States* (2014), 18.

This thesis provides an analysis of how international development organizations have sought to overcome the constraints posed by their legal and policy frameworks when dealing with countries that have very weak or no government. I seek to show how a variety of organizations have adopted or modified mostly internal rules that regulate the design, management, and delivery of development assistance based on their legal mandates, but also the rights and obligations that are normally accorded to recipient governments. More precisely, I compare the rule-making processes and outcomes of the World Bank,³² the African Development Bank (AfDB), the Asian Development Bank (ADB), and the European Union (EU), with the aim of identifying the commonalities and differences in the way they deal with fragile states.

Such an analysis is not merely a scholarly endeavor, but holds considerable practical relevance. At a time where development organizations invest a significant amount of research and resources into finding a response to the challenges of aiding fragile states,³³ this thesis offers a more complete account of the nature of these challenges, and provides an inventory of different approaches that have been developed in response. After all, the surge of legal and policy reforms through which international development organizations have sought to enhance engagement with fragile states suggests that there is a clear demand for more appropriate rules – rules that provide guidance, but are flexible enough to take into account different country circumstances, for instance.³⁴ Besides, current poverty projections suggest that the question how to design an appropriate regulatory framework for aiding fragile states will remain of practical concern to international development organizations for decades to come. By 2015, half of the world's poor living of less than USD 1.25 a day will already be in fragile states, and this concentration of poverty is expected to continue.³⁵

³² 'World Bank' in this thesis denotes the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). I use the term 'World Bank' and 'Bank' interchangeably.

³³ The amount of Official Development Assistance (ODA) going to fragile and conflict-affected states has more than doubled between 2000 and 2010. OECD, *'Fragile States 2013. Resource Flows and Trends in a Shifting World'*, Figure 2.1 (p. 50).

³⁴ ANNE-MARIE LEROY, 'The Bank's Engagement in the Criminal Justice Sector and the Role of Lawyers in the "Solutions Bank": An Essay', in Legal Vice Presidency (ed) *Annual Report FY 2013. The World Bank's Engagement in the Criminal Justice Sector and the Role of Lawyers in the "Solutions Bank"* (The World Bank 2013).

³⁵ OECD, *'Ensuring Fragile States Are Not Left Behind. 2013 Factsheet on Resource Flows and Trends'* (2013); and the projection of HOMI KHARAS & ANDREW ROGERSON, Overseas Development Institute, *'Horizon 2025. Creative Destruction in the Aid Industry'* (2012), chapter 2.

Finally, there is one more reason why the regulatory activities of international development organizations concerning fragile states warrant our attention – and critical scrutiny. As I will demonstrate, international development organizations respond to the challenges of engaging with fragile states not only *ad hoc*, but adapt their legal and policy frameworks, and hence seek a more formalized response. This is remarkable, considering that some of these challenges go back to the ‘effective government’ premise that lies at the heart of the state-centric international legal order. International law may acquiesce to a government’s loss of effectiveness until it is merely fictitious – for the sake of legal certainty, or the protection of national autonomy.³⁶ Upholding such a legal fiction does not, however, solve the various problems that the discrepancy between a country’s legal status and its actual capacity can entail in the practice of international cooperation – as illustrated by the example of international organizations in need of an interlocutor, signatory, and ‘owner’ of the development process. When development organizations adapt rules to account for variations of government effectiveness, or deal with the absence of a government in power, they engage in an area full of intricate questions – questions to which neither general rules and principles of international law, nor the (primary) law of international organizations necessarily provide clear answers.³⁷

Against this background, the response of international development organizations deserves more attention because it could be instructive for other areas of international cooperation – international trade, environmental cooperation, or in principle any area that builds on the existence of ‘effective government’ to negotiate, sign, and give real effect to treaty obligations or other forms of regulation.³⁸ State fragility is no isolated phenomenon – and we may find that where the discrepancy between juridical statehood and empirical statehood leads to structural problems for

³⁶ A temporary loss of effective control or disappearance of government does not automatically lead to the extinction of the state under international law. On the principle of continuity, see, for instance, KREIJEN, *State Failure, Sovereignty and Effectiveness. Legal Lessons from the Decolonization of Sub-Saharan Africa*, at 363 ff.

³⁷ As I elaborate in chapter I.3 b), general international law – based on the legal doctrine of statehood and the principle of sovereign equality – holds no overarching response to dealing with countries that are considered unable or unwilling to fulfill certain rights and obligations. Concepts such as the “responsibility to protect” remain contested and still evolving.

³⁸ With examples from other areas of international cooperation where the lack of an authorized and sufficiently competent government can pose a challenge to the functioning and effectiveness of international legal regimes, see GIORGETTI, *A Principled Approach to State Failure. International Community Actions in Emergency Situations*; and BENEDICT KINGSBURY & KEVIN DAVIS, New York University, Hauser Globalization Colloquium Fall 2010 - Session December 1, ‘*Obligation Overload: Adjusting the Obligations of Fragile or Failed States*’ (2010), pp. 4-7; and the conclusion of this thesis, where I discuss the broader relevance of my findings.

which existing rules are systematically inadequate, they need to be addressed through adapting the rules.³⁹ The underlying assumption is that systematically inadequate rules forfeit the ability to guide and constrain, and the potential to serve as a basis for transparent and consistent decision-making.⁴⁰

The response of development organization equally deserves critical scrutiny, however, considering what is at stake: the sovereignty and formal equality of weaker states. Any attempt at introducing rules that differentiate between states on the basis of different levels of capacity or will to fulfill certain functions must be met with considerable caution, not least for the risk of cementing a second-class status of statehood.⁴¹ After all, who decides what constitutes a sufficient level (or quality?) of effective government, and what are the consequences?

The importance of such concerns becomes clear when looking at development cooperation with fragile states. Decisions that concern the objectives and means of development interventions are generally taken in a context of material inequality, economic dependencies, and power discrepancies between donors and recipients – a context where donors wield considerable power and influence, with the ability of recipients to integrate their preferences constantly endangered.⁴² International development organizations wield influence not only when they become involved in domestic institution-building and governance reforms in recipient countries.⁴³ The influence starts with setting the rules, mostly single-handedly and often informally,

³⁹ E.g. GEIB, *Failed States. Die normative Erfassung gescheiterter Staaten*, 310, arguing that the lacuna resulting from international law's formalist assumption of functioning statehood was too critical to be addressed merely on a case-by-case basis, and through *ad hoc* decisions grounded in politics, not law.

⁴⁰ MICHAEL IOANNIDIS & ARMIN VON BOGDANDY, 'Systemic Deficiency in the Rule of Law: What it is, What has been done, What can be done', 51 *Common Market Law Review*, 59 (2014), at 72-73, according to whom a legal system stops fulfilling "its core function, to support reliable expectations", if its rules are systematically ignored, for instance because states lack the capacity to comply. On demands concerning the flexibility of public international law – for reasons of legitimacy and effectiveness – see also ISABEL FEICHTNER, *The Law and Politics of the WTO Waiver. Stability and Flexibility in Public International Law* (Cambridge University Press, 2012), pp. 6-20; 325.

⁴¹ The risk is not negligible, considering the colonial origins of international law and its history of differentiating between civilized and uncivilized states. On the origins and persistence of formalized hierarchies in international law, see GERRY J. SIMPSON, *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004) and ANTONY ANGHIE, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press, 2005) respectively.

⁴² DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 238, 257.

⁴³ This is particularly true for post-conflict and fragile states. See KRISTEN E. BOON, "'Open for Business': International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law", 9 *New York University Journal of International Law & Politics*, 513 (2007).

that determine the terms and conditions and recipients of aid.⁴⁴ Fragile states, in turn, usually belong to the most aid-dependent countries, and – provided there is a government – are in a weak bargaining position to negotiate with international development organizations.⁴⁵ In this context, rules that protect the right of every government to request external assistance, to determine the country's development objectives, and to participate in the planning and implementation of development projects assume a crucial role, and should not be simply discarded.

It is hence impossible to study the regulatory activities of international development organizations concerning fragile states without paying attention to another side of the tale – one where organizations appear as influential rule-makers that operate in an unequal environment, and where it is far from clear on what basis and for what purposes they consider countries as fragile. This thesis critically scrutinizes how international development organizations attempt to uphold the formal sovereignty of recipient states, while dealing with the consequences of empirical fragility.

2. Approach and Structure

In line with the objectives outlined, I propose a rather unusual approach for scholars of international law to grapple with state fragility – but one that mainly requires directing attention to a concrete question. How, and to what effect have international development organizations adapted rules in their legal and policy frameworks to engage with fragile states? The underlying idea is that by examining what position fragile states are accorded by other legal subjects, we learn more about the significance of state fragility from the perspective of international law. In the field of development cooperation, international organizations have sought to systematically

⁴⁴ E.g. BRADLOW, 'International Law and the Operations of the International Financial Institutions', pp. 25-27; or BENEDICT KINGSBURY, 'Global Administrative Law in the Institutional Practice of Global Regulatory Governance', in Hassane Cissé, et al. (eds), *The World Bank Legal Review. Volume 3. International Financial Institutions and Global Legal Governance* (The World Bank, 2012), 13, arguing with regards to the internal rule-making activities of International Financial Institutions (IFIs) that “the drawing, nudging, and redrawing of the lines are themselves a significant form of governance”.

⁴⁵ In 2011, aid accounted for 29% of all inflows to fragile states, as compared to other developing countries, where aid accounted for only 5%. OECD, *'Fragile States 2014. Domestic Revenue Mobilization in Fragile States'*, p. 36. Some fragile states, however, have a rather strong bargaining position vis-à-vis international donor institutions, if donors have a strategic or political interest in engaging with these countries. See HUBERT KNIRSCH, 'Die Internationalen Finanzinstitutionen und Prekäre Staaten', in Stefani Weiss & Joschka Schmierer (eds), *Prekäre Staatlichkeit und Internationale Ordnung* (2007), at 426.

respond to the difficulties of engaging with countries that have the legal status of states, but very weak or no government. Insofar as the response involves the use of formal or informal legal rules, which directly or indirectly concern the rights and obligations accorded to fragile states, it is also of legal significance.⁴⁶

While the approach of this thesis holds a broader relevance to which we return in the conclusion, my principal focus is thus on development cooperation, and on the practice of international organizations. As illustrated before, it is a focus that makes the analysis relevant and rewarding, both for development practitioners and international legal scholars. However, it comes with a number of difficulties that need to be clarified upfront.

To begin with, development cooperation is a policy field that is only starting to attract more attention from legal scholarship.⁴⁷ The process by which donor states or international organizations provide aid to developing countries is mostly considered as political and voluntary, perhaps guided by technical considerations, but not by legal rules. Thinking of development cooperation as a process instructed by law will thus be new to many development practitioners and legal scholars alike. Yet, while other rationalities may be dominant in the allocation and implementation of foreign aid, this does not mean that law plays no role therein.⁴⁸ How national and international donors provide assistance to a country is subject to rules, which define the objectives, establish terms and conditions, and regulate the process of development cooperation.⁴⁹ These rules are mostly set by donors, but they can equally determine the roles and responsibilities of (fragile) recipient countries in development

⁴⁶ Jochen Frowein takes a similar approach in his study of *de facto* regimes, which also challenge the formalist doctrine of statehood. Frowein finds that “[b]ecause of the imperfect nature of international law no possibility exists of clarifying whether entities have the quality of States although they are not recognized as such. Therefore, it is of great importance to analyze State practice as to the position of those regimes in international law.” JOCHEN FROWEIN, ‘De Facto Regime’, in Rüdiger Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, March 2013), para. 2, and JOCHEN FROWEIN, *Das de facto-Regime im Völkerrecht* (Heymann, 1968), pp. 1-3.

⁴⁷ This is not entirely true, if we consider that the role of (domestic) law as an instrument in development cooperation has concerned international lawyers at the latest since the 1970s. How promoting the rule of law and access to justice can benefit development are, however, entirely different questions than what role law plays in the regulation of development cooperation itself. On different approaches to law and development cooperation, see also *infra* note 409.

⁴⁸ With a convincing discussion of the reasons why development cooperation has not yet attracted more attention from international lawyers, and why law nonetheless plays or should play a role in this field, see DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 27-32.

⁴⁹ *Ibid.*. With a more narrow focus on international donors organizations, also DANIEL D. BRADLOW & DAVID B. HUNTER (eds), *International Financial Institutions and International Law* (Kluwer, 2010); and with a broader focus on private (national or international) donors, KEVIN DAVIS, ‘Financing Development’ as a Field of Practice, Study and Innovation, 168 *Acta Juridica*, 168 (2009).

cooperation.⁵⁰ Based on Dann's foundational work, I refer to the body of rules that regulate the transfer – the allocation, planning, and implementation – of Official Development Assistance (ODA) as the law of development cooperation.⁵¹

One of the reasons why the law of development cooperation is a field of law that has long escaped the attention of legal scholars is its relative informality, or more precisely, the mixing of traditional sources of international law with some more informal sources.⁵² Herein lies a further difficulty that we will have to grapple with, as becomes clear when looking at the sources that regulate the conduct of international organizations engaged in development cooperation. At first glance, the focus on international organizations makes it easier to comprehend that development cooperation is governed by legal rules and procedures. International organizations are founded by states through an international legal treaty, and this founding treaty becomes a quasi-constitutional framework for all their activities. In the case of development organizations, the founding treaty usually defines for what purposes the organization may provide ODA, and further circumscribes how.⁵³ Clearly, the conduct of international development organizations thus does not follow political or technical considerations alone.

More concrete rules that guide the conduct of international development organizations, however, are contained not in founding treaties, but are later adopted by various organs of an organization, and *prima facie* apply only internally. It is at least controversial to what extent this sort of secondary rules can be shoehorned into the traditional sources of international law as established in Art. 38 of the Statute of the International Court of Justice (ICJ).⁵⁴ Certainly, they continue to fall largely off

⁵⁰ DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 200, 217.

⁵¹ Ibid., 13-14. What constitutes ODA is defined by the OECD DAC based on three elements: that resources are provided by official agencies, serve the main objective of promoting “economic development and welfare of developing countries”, and have a concessional character. See online, <http://www.oecd.org/dac/stats/officialdevelopmentassistance/definitionandcoverage.htm#Definition> (accessed December 2014). Dating back to 1972, the ODA definition excludes a variety of forms and actors through which financing is increasingly provided to developing countries. At the time of writing, the OECD was therefore in the process of reviewing it. Even if the ODA definition will consequently be extended, it will still include the provision of development assistance through international organizations, and will hence remain relevant considering the focus of this thesis.

⁵² Ibid., 29. On the legal nature and effects of the sources of the law of development cooperation, see *infra* chapter III.1.

⁵³ On the substance of rules contained in the legal frameworks of international development organizations, see *infra* chapter III.2.

⁵⁴ See, for instance, JOSÉ E. ALVAREZ, *International Organizations as Law-Makers* (Oxford University Press, 2005), 237, arguing that the World Bank's internal rules can be seen as sources in the sense of Art. 38; or MARKUS BENZING, 'Secondary Law', in Rüdiger Wolfrum (ed) *The Max Planck*

the radar of international legal scholarship, while they can assume significant effects, including outside an organization's internal sphere.

Therefore, when examining how international development organizations adapt their legal and policy frameworks to engage with fragile states, I take internal rules seriously – and demonstrate why legal scholars are well advised to do so. I show that internal rules are potent instruments in steering the conduct of international development organizations, and regularly assume external effects for recipient countries through formulating the terms and conditions, including procedural rights, for the transfer of ODA. Internal rules can be used to consolidate organizational practices or authoritative interpretations of the founding treaties, and thus affect existing treaty law.⁵⁵ Rules that are relatively formalized and internally binding can thus be seen as part of an organization's legal framework. The various instruments the organs of international organizations produce to provide further, non-binding guidance to staff instead belong to the policy framework. In considering both, I acknowledge that formal and informal rules often interact in the law of development cooperation – and that informal does not always mean ineffective.⁵⁶

There is one more difficulty concerning the approach of this thesis that comes not from the focus on the law of development cooperation, or on the rules of international organizations in particular. Instead, it concerns the very notion of fragile states. It bears repeating that fragile state is no legal term, and we will see that international law is indeed short of concepts to grasp a variable condition such as state fragility.⁵⁷ If anything, fragile states are best described with reference to the discrepancy between

Encyclopedia of Public International Law (Oxford University Press, March 2007), para. 2, stating that there is a “growing consensus that secondary rules promulgated by international organizations today form part of the sources of international law.” In contrast, other legal scholars find that only secondary legislation belongs to the traditional sources of international law, whereas internal rules and organizational practice are a „distinct source of law in the internal legal order of the organization“. CHRISTIANE AHLBORN, Amsterdam Center for International Law (ACIL) Research Paper No 2011-03 (SHARES Series), 'The Rules of International Organizations and the Law of International Responsibility' (2011), 15-16; and in a similar vein, PHILIPPE Q. C. SANDS & PIERRE KLEIN, *Bowett's Law of International Institutions* (Sweet & Maxwell, 2001), 448 ff.. On the legal nature and effects of secondary rules, see *infra* chapter III.1.

⁵⁵ E.g. BENZING, 'Secondary Law', paras. 4 and 32; and the references in *infra* note 439.

⁵⁶ *Supra* note 52. An extensive scholarly literature is concerned with the effects of formally non-binding rules in general. See, for instance, KENNETH W. ABBOTT & DUNCAN SNIDAL, 'Hard and Soft Law in International Governance', 54 *International Organization*, 421 (2000) (from a political science perspective); DINAH SHELTON, *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press, 2003); and revisiting the doctrine of sources to propose a legitimation for soft law, MATTHIAS GOLDMANN, *Internationale Öffentliche Gewalt. Handlungsformen internationaler Institutionen im Zeitalter der Globalisierung* (Springer, 2015).

⁵⁷ Chapter I.3 b) (ii).

formal legal status, and weak capacity in fact – between the spheres of juridical statehood and empirical statehood. Yet, not only scholars of international law struggle to define what fragile states are. There is no agreed definition or classification of fragile states, although the notion has become a highly successful catchphrase in the international development community and beyond. It is used in academic and policy circles to refer to a large and extremely heterogeneous group of countries, which are basically characterized as having very weak capacity and poor governance.⁵⁸ Many, more or less subjective elements could be added, such as weak state-society relations or the prevalence of armed conflict.⁵⁹ In short: The lack of an agreed definition of fragile states is symptomatic both of the conceptual ambiguity of the notion, and of the politics inevitably involved in classifying countries as fragile.

I therefore advocate a cautious and critical handling of the notion of fragile states, or state fragility – for instance, by acknowledging that the underlying empirical phenomenon is not new, and by asking what lies behind its simplifying social construction and rising popularity as a political concept.⁶⁰ Moreover, I do not propose a clear-cut definition of fragile states where there is none. Instead, the approach of this thesis demands consideration of how other legal subjects – in our case, international development organizations – define, classify, and ultimately address fragile states through legal and policy reforms.⁶¹

Based on these preliminary clarifications, I proceed in four main steps. The first two chapters present in more detail the central puzzle: fragile states are a phenomenon beyond law, but how international development organizations have addressed the challenges of engaging with fragile states may well be of legal significance. Chapter I begins by introducing fragile states as a phenomenon that is characterized by the discrepancy between weak factual capacity, and the formal legal status of state institutions. Accordingly, I trace the emergence and meaning of the notion of fragile

⁵⁸ *Supra* note 1.

⁵⁹ Definitions of state fragility increasingly emphasize not only the lack of capacity or effectiveness on the part of state institutions, but rather their weak legitimacy. E.g. OECD, *The State's Legitimacy in Fragile Situations. Unpacking Complexity* (2010), at 7; or THE WORLD BANK, *World Development Report: Conflict, Security, and Development* (2011), at 84. For an overview of different definitions of fragile states, see MCLOUGHLIN, *Topic Guide on Fragile States*, pp. 9-14, and on the evolving conceptual understanding of state fragility in detail, chapter I.2 b).

⁶⁰ Chapter I.2.

⁶¹ I therefore use “fragile state” as a non-legal umbrella term, to explore how international development organizations perceive and address a range of challenges that the discrepancy between a country’s formal legal status, and its limited capacity in practice may entail. On the use of the notion of fragile states in this thesis, see also *infra* chapter I.1.

states from an empirical-sociological perspective, and contrast it with the typically reluctant or self-restrained perspective of international legal scholars, which have mostly neglected fragile states as an empirical phenomenon. Chapter II turns to the field of development cooperation, to illustrate how international organizations have responded to the challenges they face when seeking to engage with fragile states. I give an initial overview of the policy-making, standard-setting, and reform activities of international organizations that belong to the largest contributors of ODA to fragile states.⁶²

The second step lays the groundwork for understanding and analyzing the legal significance of such activities, and the consequences for fragile states. Chapter III therefore provides a basic understanding of the legal nature and substance of rules that normally govern how international organizations negotiate, plan, and implement development projects in collaboration with the governments of recipient countries: the law of development cooperation, or more precisely, the law of international development organizations. I first analyze the legal nature of its main sources, highlighting the various functions and potential effects of internal rules. Next, I draw on the legal frameworks of different development organizations to give an impression of the basic, normative ideas that generally instruct their conduct.

On this basis, chapters IV and V provide a systematic analysis of how, and to what effect selected international development organizations have adapted the rules of their legal and policy frameworks to engage with fragile states – the third main step. Chapter IV focuses in detail on the World Bank, the most important driver of the fragile states agenda. Chapter V subsequently compares the relevant rule-making processes, instruments, and outcomes of the World Bank with those of two organizations that have a very similar legal framework and mandate, the AfDB and the ADB, and with one organization that shows notable differences in both regards, the EU.⁶³ A comparative analysis serves to discern and analyze converging and divergent elements in the way they deal with fragile states, and accommodate state fragility in the design of the applicable legal frameworks.

⁶² Based on OECD statistics, in 2011, fragile states received the largest share of multilateral aid from the EU institutions, followed by the International Development Association (part of the World Bank Group), and the African Development Fund (ADF, part of the AfDB). OECD, '*Fragile States 2014. Domestic Revenue Mobilization in Fragile States*', p. 93. Other important donors included the ADB and the United Nations Development Programme (UNDP).

⁶³ I explain this selection of organizations in *infra* chapter II.3 b).

In the final step, I synthesize and discuss the resulting findings. Chapter VI begins by identifying broader patterns in the analyzed regulatory approaches of different organizations. Subsequently, I examine the potentials and perils of development organizations adapting legal rules to instruct and formalize how they deal with fragile states. The Conclusion summarizes my key findings and reflects on their theoretical and practical relevance beyond the field of development cooperation.

Before I begin, one final remark concerns the thesis' methodology. The very subject of fragile states calls for interdisciplinarity. It is an empirical phenomenon, a social construct, a political concept, and should interest international legal scholars. This thesis therefore advocates an approach that sees the bigger picture – even as it remains essentially concerned with adding a legal perspective to that picture. For instance, I examine the emerging fragile states discourse with a view to relevant research in the social sciences, before turning to the juridical conception of the state and the (self-)limitation of legal doctrine in describing state fragility.⁶⁴ I take a look at both practical and legal challenges that international development organizations encounter in aiding fragile states – and do not pretend that all of these can be addressed through modifying the applicable legal framework.⁶⁵ Moreover, in considering how different organizations adapt their legal and policy frameworks, I seek to understand and scrutinize their motives, too.⁶⁶

There are, however, limits for legal scholars to think outside the box without losing academic credibility. While the subject of this thesis is truly interdisciplinary, the type of questions I ask are the type of questions that can be answered with a legal methodology – and these are often not the questions that start with 'why'. We will see that a legal analysis that explains and interprets, structures, compares, and evaluates the rules that international development organizations make or modify to engage with fragile states nonetheless provides insights that reach well beyond a jurisprudence of concepts. In this sense, interdisciplinarity implies putting law in perspective, while demonstrating the relevance of a legal perspective to other disciplines.

⁶⁴ Chapter I.2.

⁶⁵ Chapter II.2 b).

⁶⁶ In particular, chapter V.3.

I. Fragile States – The Discrepancy between Empirical and Juridical Statehood

Not least since September 11, 2001, a group of countries has quickly moved from the periphery of the international community to the top of the policy agenda. It is an extremely heterogeneous group of 30-50 countries, which are loosely characterized by weak institutions and poor governance, often in combination with violent conflict.⁶⁷ To various degrees, they are unable to maintain security, enforce the law, or provide basic services to their populations. Politicians and diplomats, security experts and development practitioners, collectively refer to these countries as ‘fragile states’.

Ask an international law scholar what fragile states are, and he will likely answer what fragile states are not – namely, a legal concept. The legal status of state is a binary category, and not a matter of degree. For gradations of statehood based on form, function, or performance, there is no room in an international legal order built on the principle of sovereign equality. The formal conception of statehood and the principle of sovereign equality thus prevent obvious material inequalities and power discrepancies between states from being translated into law.

Statehood is a variable in fact, but a constant in law – this distinction between empirical-sociological accounts of statehood and the state as a legal concept is essential to understanding the phenomenon of state fragility, and shall be the starting point of my analysis. Entities that lack the capacity to perform basic state functions, but enjoy the legal status of states, are characterized by the discrepancy between empirical statehood and juridical statehood.⁶⁸ Accordingly, we need a basic understanding of the *de facto* dimension of statehood, and its *de jure* components, to comprehend the meaning and significance of state fragility – irrespective of the questionable value of the uniform classification of ‘fragile states’.

If state fragility is a phenomenon that falls at the challenging interface between fact and law, however, legal scholars might argue that it has no relevance. After all, law consists precisely of the counterfactual postulation of norms – in this case, the

⁶⁷ *Supra* note 16.

⁶⁸ Coined by Robert H. Jackson, the notions of empirical and juridical statehood serve to differentiate empirical-sociological accounts of statehood from the legal concept. See JACKSON & ROSBERG, 'Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood', p. 2; and in detail ROBERT HOUGHWOUT JACKSON, *Quasi-states. Sovereignty, International Relations and the Third World* (Cambridge University Press, 1990). On the difference between empirical and juridical statehood, see also: GERARD KREIJEN (ed) *State, Sovereignty, and International Governance* (Oxford University Press, 2002), 38 ff..

legal status of state. This is one reason why the widespread phenomenon and elusive, but influential, political concept of fragile states has received so little consideration in legal scholarship. Yet such an orthodox, positivist view risks ignoring the potential interactions or tensions between the two spheres of fact and law, which are crucial to a realistic and comprehensive account of both. By looking closer at how juridical statehood is built on the premise of ‘effective government’, and thus on the fault lines of fact and law, we see why the very discrepancy between factual capacity and legal status in fragile states constitutes a fundamental challenge – to the state-based international system, as well as its legal order.

This chapter looks at the distinction between empirical and juridical statehood, and explores the phenomenon of state fragility at the interface. Subsequent to a brief disclaimer concerning the terminology I use in this thesis (I.1), I trace the emergence and meaning of the notion of fragile states from an empirical perspective (I.2), and contrast it with the typically reluctant or self-restrained engagement of international legal scholars with state fragility, based on the static conception of the state in international law (I.3). I conclude that while state fragility is not a legal concept, legal scholars are well advised to consider how the challenges of engaging with fragile states are perceived and addressed in the practice of international cooperation (I.4).

1. Disclaimer on Terminology

Terminology constitutes meaning, and in law, it can also constitute legal consequences. Accordingly, a thesis concerned with “fragile states” first warrants a disclaimer on terminology, and this is particularly true for a legal thesis.

A Babylonian diversity of terms is used to describe the weakness, deficiency, or collapse of state institutions and authority.⁶⁹ This diversity of terms, however, hardly provides an accurate reflection of the heterogeneity and complexity of the described phenomena. Rather, the different terms often describe the same phenomenon in the same vague manner – the difference being that different actors prefer to focus on different symptoms or consequences.⁷⁰ Some allude to a state’s lack of capacity (e.g.

⁶⁹ For an overview, see MCLOUGHLIN, *Topic Guide on Fragile States*, pp. 9-14.

⁷⁰ DIANA CAMMACK, et al., Overseas Development Institute, *‘Donors and the ‘Fragile States’ Agenda: A Survey of Current Thinking and Practice. Report submitted to the Japan International Cooperation Agency’* (2006), 16, arguing that many terms can be used interchangeably without altering the meaning.

‘weak’ or ‘ineffective’ state), some rather to the lack of legitimacy or political will to abide by certain rules of the international community, with an often-pejorative undertone (e.g. ‘rogue’, ‘pariah’, or ‘outlaw’ state). In international security discourse, the emphasis is often on the security threats associated with weak statehood (e.g. ‘state sponsors of terrorism’)⁷¹, whereas in development discourse, the emphasis tends to be on a country’s development performance (e.g. ‘poor performer’; ‘difficult partner’), or its susceptibility to crisis (‘vulnerable country’; ‘country under stress’)⁷². The term ‘collapsed state’ is perhaps distinct in that it describes the end point and complete breakdown of state structures, but terms like ‘failing’, ‘fragile’ and ‘failed state’ all refer to intermediary stages, without there being a clear distinction.⁷³

The terminology of ‘fragile state’, ‘state fragility’, or ‘fragile situations’,⁷⁴ is relatively new to the international agenda, and has gradually begun to replace ‘failed state’ as the predominant vocabulary.⁷⁵ First in international security, then in development discourse, ‘fragile state’ has become the catchphrase for policymakers as well as academics to refer to a heterogeneous group of states, which for various reasons have become a particular concern to the international community.⁷⁶ At the United Nations (UN), it crops up with increasing frequency since 2007,⁷⁷ and rapidly

⁷¹ Notably, in the United States, “state sponsors of terrorism” is a classification made by the Secretary of State, to which certain legal consequences under US law are attached, namely section 6(j) of the Export Administration Act, section 40 of the Arms Export Control Act, and section 620A of the Foreign Assistance Act.

⁷² The World Bank used to describe countries with weak policies, institutions, and governance as “Low-Income Countries Under Stress” (LICUS). On the LICUS initiative, see *infra* chapter II.3 b).

⁷³ For example, Chiara Giorgetti speaks of a „a continuum from strong to weak states in which it is possible to identify weak or fragile states, failing states, failed states, and finally the extreme version: collapsed states.“ GIORGETTI, *A Principled Approach to State Failure. International Community Actions in Emergency Situations*, 49.

⁷⁴ Since 2009, the OECD DAC, the World Bank, and other donors have begun to refer increasingly to ‘fragile situations’ rather than ‘fragile states’. This terminological fine-tuning acknowledges that there can be pockets of fragility within non-fragile countries and is thus less state-centric. For the sake of simplicity, however, this thesis predominantly refers to ‘fragile states’ or ‘state fragility’.

⁷⁵ The term ‘failed state’ was coined by Helman and Ratner in 1992 (GERALD B. HELMAN & STEVEN R. RATNER, ‘Saving Failed States’, 89 *Foreign Policy*, 3 (1992)) and quickly found its way both into U.S. and European security policy, namely the National Security Strategy of the United States of America (September 2002) and the European Security Strategy (12 December 2003). In contrast, the 2010 U.S. National Security Strategy and U.S. Global Development Policy Fact Sheet now refer only to “fragile states” and “fragile democracies”, so does the 2005 European Consensus on Development (*infra* note 297).

⁷⁶ On the genesis of the concept of fragile states, see also SIMONE BERTOLI & ELISA TICCI, ‘A Fragile Guideline to Development Assistance’, 30 *Development Policy Review*, 211 (2012).

⁷⁷ A search of the UN’s official documents since 2000 yields 56 hits for “fragile state(s)” until 2006, and 227 hits from 2006 to 2010 (in contrast to a total of 108 hits for “failed state” between 2000 and 2011). Both terms appear in debates of the UN Security Council and General Assembly, as well as reports and statements of the Secretary-Generals. Until today, neither “fragile state” nor “failed state” has appeared in a Resolution of the Security Council or General Assembly.

makes its way into official policy documents of international organizations like the OECD, the World Bank, and the European Union.⁷⁸ The term is picked up in national policy guidelines and operational strategies of major Western donor states like the United States, the United Kingdom, Canada, France and Germany.⁷⁹

Compared to other terms, ‘fragile state’ thus features a new quality: it does not only group together certain states or situations for analytical purposes, but also for the purposes of international policy-making. At the same time, it seems no longer politically incorrect to refer to fragile states, since a group of developing countries – the “g7+” – have endorsed the label and developed a proper definition of fragility.⁸⁰ To some extent, the success of the fragile states terminology is also owed to the fact that it reflects an evolving understanding of the causes and consequences of weak or collapsed state authority – for instance, acknowledging the process-like dimension of the phenomenon, and including a wider range of states on a continuum of fragility.

Nevertheless, the fragile states terminology shares many of the shortcomings of previous terms like failed state, and is thus quite rightly criticized both as analytically imprecise and judgmental. The criticism begins with the imprecise connotation of the word “fragile”. The English word “fragile” can mean “easily broken or damaged” or “easily destroyed or threatened” when used in relation to objects, “delicate and vulnerable” in relation to persons, and in an antiquated sense, “morally weak” or “liable to err or fall into sin”.⁸¹ Accordingly, one could think of a number of meanings where fragile is used as an adjective to describe an organized political community, rather than a condition. The described entities could be threatened to fully collapse into anarchy, for instance, or have morally corrupted governments. A fragile state

⁷⁸ On the use of the fragile states terminology in policy and operational documents of the OECD, the World Bank, the European Union, and other international development organizations, see *infra* chapter II.3.

⁷⁹ Examples include the USAID, Fragile States Strategy (January 2005) and the US Global Development Policy Fact Sheet (September 22, 2010); DFID’s Policy Paper, *Why we Need to Work More Effectively in Fragile States* (2005); Canada’s International Policy Statement, *A Role of Pride and Influence in the World* (2005); France’s Policy Paper on Fragile States and Situations of Fragility (2007); or Germany’s guidelines for a coherent policy on fragile states (“Für eine kohärente Politik der Bundesregierung gegenüber fragilen Staaten - Ressortübergreifende Leitlinie”) of August 2012.

⁸⁰ The g7+ is an informal forum of developing countries and self-declared fragile states that advocate for their interests vis-à-vis international partners. The g7+ define fragility “as a period of time during nationhood when sustainable socio-economic development requires greater emphasis on complementary peacebuilding and statebuilding activities such as building inclusive political settlements, security, justice, jobs, good management of resources, and accountable and fair service delivery.” g7+, *Note on the g7+ Fragility Spectrum* (November 27, 2013). On the g7+ and its membership, see *infra* note 139.

⁸¹ Oxford Dictionary, available online: <http://oxforddictionaries.com/definition/fragile> (accessed October 2014).

could also be particularly vulnerable to internal or external stresses, suggesting that we use the term as a metaphor that means “handle with care”. Considering how the term is commonly used does not provide more clarity: countries are referred to as fragile when they have very weak capacity, like Liberia, or when they are unresponsive to their citizens or the international community, like Gaddafi’s Libya. Likewise, the term fragile state has been used synonymous with complete state failure, or to describe a country that it is at risk of becoming a failed state.⁸² Besides, not only the connotation of “fragile” is imprecise, but also the reference to “states”, since fragility can also occur at the sub-national or transnational level.⁸³

The notion of fragile states is further criticized as judgmental because it suggests a certain deficiency contrasted with the image of a Western, ideal notion of statehood, and comes with implicit but not always adequate assumptions of how a resilient state should function and perform.⁸⁴ The international community may have realized that the more disparaging reference to ‘state failure’ is not conducive to its efforts in aiding the states concerned, but the stigmatizing undertones of labeling a country as ‘fragile’ do not go away easily.⁸⁵ In this sense, much of the criticism applied to the label ‘failed state’ equally applies to ‘fragile state’ – it “is inaccurately state-centric, is destructively ambiguous, misplaces normative liability and attracts dangerous colonialist nostalgia”.⁸⁶

A legal thesis must take the analytical and normative shortcomings of the term “fragile state” particularly seriously. Jan Klabbers once ironically suggested in a legal blog introducing a concept of “soft statehood”, in parallel to the concept of “soft

⁸² E.g. DAN HARRIS, et al., German Development Institute, Discussion Paper 9/2009, ‘*Country Classifications for a Changing World*’ (2009), p. 23: “Fragile implies a strong potential or possibility for failure”.

⁸³ Instead of ‘fragile state’, the terms ‘fragile situations’ or ‘situations of fragility’ have therefore become more common. *Supra* note 74.

⁸⁴ As Rosa Brooks asks, “what, if anything, is the value of treating the world’s many unstable and strife-ridden societies as “failed states,” if in fact they never possessed most of the attributes of functioning states in the first place?” ROSA EHRENREICH BROOKS, ‘Failed States, or the State as Failure?’, 72 *The University of Chicago Law Review*, 1159 (2005), 1174.

⁸⁵ Criticism of the stigmatizing undertones of the failed- or fragile states is widespread: e.g. RALPH WILDE, ‘The Skewed Responsibility Narrative of the “Failed States” Concept’, 9 *ILSA Journal of International & Comparative Law*, 425 (2003), 425; RUTH GORDON, ‘Saving Failed States: Sometimes A Neocolonialist Notion’, 12 *American University Journal of International Law and Policy*, 903 (1997); or CHARLES T. CALL, ‘The Fallacy of the ‘Failed State’’, 29 *Third World Quarterly*, 1491 (2008), 1499.

⁸⁶ HENRY J. RICHARDSON, ‘“Failed States”, Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations’, 10 *Temple International and Comparative Law Journal*, 1 (1996), 77.

law”.⁸⁷ In reply to the many commentators that took him at face value, Klabbers reiterated that unlike other disciplines, law is a formal category, which must operate in a binary fashion – and that unlike social scientists and ethicists, lawyers must therefore refrain from any attempt to describe states as harder or softer.⁸⁸ In other words, international relations scholars may deconstruct and question claims to statehood and sovereignty as formal categories against the background of empirical observations about limited state capacity, or the politics involved in granting or denying such titles and entitlements in the first place. When international lawyers speak of ‘fragile states’, however, they must face the suspicion of seeking to question the integrity of the juridical doctrines of statehood and sovereignty.

Certainly, the danger of a “legal rationalization of political realities” is real when legal scholars negligently blend political and normative concepts and create confusion about the legal consequences.⁸⁹ Particularly the notion of failed state could wrongly suggest, for instance, that the weakness or even breakdown of government authority would automatically lead to the termination of the state and its international legal personality, or to a qualification of its sovereign equality before the law. Critical legal scholarship has also sharpened our understanding of the “politics of redefinition”,⁹⁰ and thus pointed to a number of significant questions. Most importantly, who has the power to call a state “fragile”, on the basis of what, and for what purpose? After all, the advent of a new terminology often obscures the persistence of underlying concepts and reason – in this case, the patronizing mindsets of “civilized nations” and an often interventionist agenda.⁹¹

I therefore emphasize from the outset that “fragile state” is not a legal term or concept. As the following section show, usages of the term as empirical-descriptive or normative concept are often hard to disentangle. Nonetheless, I use the term “fragile state” as a non-legal umbrella term because it is not less analytically precise than

⁸⁷ JAN KLABBERS, *Soft Statehood?*, *Opinio Juris* (January 20, 2010), at <http://opiniojuris.org/2010/01/20/soft-statehood/>.

⁸⁸ JAN KLABBERS, *More Soft Statehood...* *Opinio Juris* (22 January 2010), at <http://opiniojuris.org/2010/01/22/more-soft-statehood/>.

⁸⁹ ALEXANDROS YANNIS, 'The Concept of Suspended Sovereignty in International Law and its Implications in International Politics', 13 *European Journal of International Law*, 1037 (2002), p. 1038.

⁹⁰ MARTTI KOSKENNIEMI, 'The Politics of International Law - 20 Years Later', 20 *ibid.*, 7 (2009), p. 11, referring to the politics of redefinition as “the strategic definition of a situation or a problem by reference to a technical idiom so as to open the door for applying the expertise related to that idiom, together with the attendant structural bias.”

⁹¹ E.g. DAVID CHUTER, 'Must Do Better: The African State, The African State, and the State of Africa', 62 *Studia Diplomatica*, 27 (2009), 28: “changing terms are just successively more polite forms of the same idea.”

others, while it allows shifting the focus from the total collapse of effective government to the much more widespread occurrence and variances of weak statehood. Moreover, like no other term, “fragile state” has become the international community’s rallying cry for dealing with weak, political instable, conflict-ridden countries in an increasingly systematic manner, which is the subject of this thesis.

2. Empirical Grasp on Fragile States

“Empirically, the state must be treated as a variable rather than the constant supposed by legal theory.” – John Peter Nettl, 1968⁹²

Various disciplines are concerned with the normative ideal and empirical functions, the emergence and evolution of states as a form of organized political community. As the quote by the American sociologist John Peter Nettl suggests, the decisive difference between empirical and legal approaches to statehood lies in the engagement with the state as a variable or as a constant. From an empirical-sociological perspective, “stateness, or the saliency of the state, in different societies is indeed a quantitative variable”.⁹³ Form, functions, and the effectiveness of states can vary greatly over time and space, although they are regularly presented as variations of an ideal type: the Western model of a hierarchical nation state with a bureaucratic apparatus at its core, providing security, justice, and welfare to its citizens.

The following section approaches statehood from an empirical perspective, and state fragility as a variation of statehood in its *de facto* dimensions. I begin by highlighting that the existence of states that assume different functions with variable degrees of effectiveness is neither new nor exceptional, since the particular Western state model in many parts of the world never really took root, and its continued validity is challenged by the effects of globalization on the autonomy and capacity of states everywhere (a). On this basis, I explore how the empirical phenomenon of weak statehood suddenly began receiving so much attention, through tracing the evolving discourse and understanding of fragile states over the last two decades (b).

⁹² JOHN PETER NETTL, 'The State as a Conceptual Variable', 20 *World Politics*, 559 (1968).

⁹³ Ibid., 579. Also: CHRISTOPHER CLAPHAM, 'Degrees of Statehood', 24 *Review of International Studies*, 143 (1998).

a) Empirical Statehood – The State as a Variable

In empirical terms, the state has always been a variable of different forms, functions, and capacities. Yet, different manifestations of statehood are often presented as variations of a common theme: the Western state model. This is not surprising, considering that the concept of modern statehood has a geographically confined, historical origin. Whereas people have been living in modes of social organization other than states for most of human existence, a process of state formation occurring in Western Europe between the 17th and 19th century has brought about a model of organization that has since come to dominate the political map around the globe.⁹⁴ This particular model of social organization – the centralized, hierarchical nation state – is equally the product of an intellectual tradition that has its origins in Western Europe. The institutional patterns and functions of the modern state, for instance, were further delineated in the works of the German sociologist Max Weber, who described the state as relying on a bureaucratic apparatus with the ability to maintain a claim to the monopoly of the legitimate use of force.⁹⁵ In turn, the idea that the state is founded on a social contract between the rulers and the ruled, which attribute certain functions to the state and in turn pledge to pay taxes and obey the law, emerged from the works of influential political theorists like the English John Locke and the French Jean-Jacques Rousseau.⁹⁶ Both Weber's monopoly of the use of force and the social contract theory have become key references in most accounts of modern statehood – and as I return to shortly, in accounts of fragile statehood.⁹⁷

⁹⁴ There is a rich literature on state-building processes in Western Europe, often described as the particularization of sovereignty into smaller territorial units and ethnically defined areas and the centralization, institutionalization, and consolidation of power within these territories. For instance, CHARLES TILLY (ed) *The Formation of National States in Western Europe* (Princeton University Press, 1975); THOMAS ERTMAN (ed) *Birth of the Leviathan: Building States and Regimes in Medieval and Early Modern Europe* (Cambridge University Press, 1997). Interestingly, the emergence of the national state is still often referred to as a historical accident. For instance, Nettle finds that “the most remarkable factor in the concretization of statehood in the historical experience of various countries is the apparent randomness of such development”. NETTL, 'The State as a Conceptual Variable', p. 566.

⁹⁵ WOLFGANG J. MOMMSEN & WOLFGANG SCHLUCHTER (eds), *Gesamtausgabe Max Weber. Wissenschaft als Beruf, 1917/1919 - Politik als Beruf, 1919* (Mohr, 1992).

⁹⁶ E.g. JOHN LOCKE, *Two Treatises of Government* (1689) (University Press, 1960); JEAN-JACQUES ROUSSEAU, *Du Contrat Social* (1762) (Rieder, 1922)

⁹⁷ Chapter I.2 b). The limited explanatory value of the Western state model beyond the Western hemisphere has been elaborated in many studies on state failure or fragility, for instance, MARTINA FISCHER & BEATRIX SCHMELZLE, Berghof Research Centre for Constructive Conflict Management,

The Western (or ‘European’, ‘Weberian’, ‘Westphalian’) state model, however, proved not to be easily transferable to other parts of the world – in fact, it is an ideal that has probably “never been an accurate description of many of the entities that have been regarded as states”.⁹⁸ In the late 19th and 20th century, the model spread and was spread across the world in the wake of decolonization. Newly independent nations that emerged after the First and Second World War were indeed striving for statehood, seeking self-determination, integration, and domestic viability by adopting the typical structures of states found in Western Europe. These processes often involved the transplantation or imposition of institutions on other forms of social organization, however, which would continue to exist below a “semi-fictional overlay”.⁹⁹ In the absence of certain historical, intellectual, and cultural dispositions, the Western state model did often not take root. Rather, the struggle of the “post-colonial state” particularly in Africa was partly attributed to the importation of practices and mentalities of the colonial state into its post-colonial successor: hierarchical, governmental structures, insulated from civil society and relying on thinly spread local elites, personalized networks of patronage, and clientelist loyalty.¹⁰⁰ Moreover, colonialism had lasted long enough to destroy traditional, pre-colonial structures, while leaving newly independent states with underdeveloped infrastructure and weak institutions.¹⁰¹ Consequently, the accumulated cost of maintaining the sort of state that had turned into a global norm by decolonization, in particular the institutional and administrative capacities it required for the expected provision of public goods, could

Dialogue Series 8, *Building Peace in the Absence of States - Challenging the Discourse on State Failure* (2009).

⁹⁸ STEPHEN D. KRASNER, 'Rethinking the Sovereign State Model', 27 *Review of International Studies*, 17 (2001), 1.

⁹⁹ OUTI KORHONEN, 'The ‘State-Building Enterprise’: Legal Doctrine, Progress Narratives and Managerial Governance', in Brett Bowden, et al. (eds), *The Role of International Law in Rebuilding Societies after Conflict. Great Expectations* (Cambridge University Press, 2009), at 21; and *infra* chapter I.2 b).

¹⁰⁰ There is by now a vast literature on the African post-colonial state, which social scientists begun studying since the 1980s. E.g. PIERRE ENGLEBERT & DENIS M. TULL, 'Postconflict Reconstruction in Africa Flawed Ideas about Failed States', 32 *International Security*, 106 (2008), 111, arguing that “at no point in the postcolonial era remotely resembled the ideal type of the modern Western polity.” In detail, see YOUNG CRAWFORD, *The African Colonial State in Comparative Perspective* (Yale University Press, 1994); PIERRE ENGLEBERT, *State Legitimacy and Development in Africa* (Lynne Rienner Publishers, 2000); or JEFFREY HERBST, *States and Power in Africa: Comparative Lessons in Authority and Control* (Princeton University Press, 2000).

¹⁰¹ Pre-colonial state structures existed, for instance, in the Ashanti Empire (now Southern Ghana), the Kingdom of Congo (cutting across today’s Angola, Republic of Congo, and Democratic Republic of Congo). On the long history and diversity of pre-colonial social and political organization in Africa, see, for instance, CHRISTOPHER EHRET, *The Civilizations of Africa: A History to 1800* (University of Virginia Press, 2002); or HERBST, *States and Power in Africa: Comparative Lessons in Authority and Control*, pp. 35-57.

not always be born. As Christopher Clapham sums up: “[i]n a world conditioned by the idea of progress, and accustomed to the state as an essential element in the march of progress, the universality of this form of organization has been taken for granted, while the question of whether the whole world could afford states has been ignored.”¹⁰²

The last episode in the evolution of modern statehood – its expansion to all parts of the world by means of granting the formal attributes of state sovereignty to newly independent nations – thus significantly increased the variation of statehood, perhaps at the same time as heralding its decline.¹⁰³ Since then, the profound political and sociological transformations associated with globalization have eroded the power of the state as exclusive territorial authority everywhere.¹⁰⁴ No state can today fully control its borders, run its economy autonomously, and protect its citizens from transnational threats on its own.¹⁰⁵ Accordingly, intergovernmental cooperation has become closer, and states are delegating sovereign tasks to international organizations and submitting to international regulation at a growing pace.

Looking at statehood from an empirical-sociological perspective thus exposes how the existence of states that fulfill variable functions with variable degrees of capacity is neither a new, nor necessarily an exceptional phenomenon. If anything, the discrepancy between an ideal type of statehood and its variable manifestations has become more apparent in all parts of the world, including the so-called Western hemisphere. Nevertheless, as a form of political organization and fundamental building block of the international system, the state has remained remarkably intact. Political entities are still thriving towards statehood, and care to maintain its formal

¹⁰² CHRISTOPHER CLAPHAM, 'The Challenge to the State in a Globalized World', 33 *Development & Change*, 775 (2002), 778.

¹⁰³ NETTL, 'The State as a Conceptual Variable', p. 574.

¹⁰⁴ E.g. PETER EVANS, 'The Eclipse of the State? Reflections on Stateness in an Era of Globalization', 50 in *ibid.*, 62 (1997), at 68 ff.; HEINHARD STEIGER, 'Geht das Zeitalter des souveränen Staates zu Ende?', 41 *Der Staat*, 331 (2002), 337-346, arguing that globalization has affected all three dimensions of statehood: its territoriality, its integrative power, and the exclusivity of its claim to regulatory competence; ANNE-MARIE SLAUGHTER, *A New World Order* (Princeton University Press, 2004), studying the effects of globalization through the lens of the concept of the “disaggregated state”; ALICE TEICHOVA & HERBERT MATIS, 'Introduction', in Alice Teichova & Herbert Matis (eds), *Nation, State and the Economy in History* (Cambridge University Press, 2003), pp. 1-10, at 7 (“The nation-state is a historical phenomenon, and as such liable to ‘expiry’ fostered by the globalization process.”).

¹⁰⁵ In some ways, however, the globalizing economy has also reinforced the institutional centrality of the state, as ‘high stateness’ proved to be a comparative advantage for some countries. For instance, a strong state capable of providing legal certainty and exerting control over the economy through regulation is often seen as beneficial to economic development. On the model of the ‘developmental state’, see *infra* note 118).

appearance by cultivating state institutions even where they amount to a mere camouflage. The evolving discourse on state fragility to which we turn now therefore unfolds largely within the confines of an established, though historically contingent and normatively charged notion of statehood.

b) The Evolving Understanding of Fragile States

If the existence of stronger and weaker statehood is not a new phenomenon, how did the notion of state fragility become so prominent over the last two decades? Is it the result of a change of factual circumstances, or rather shifting perceptions in the light of a changing global policy environment? While the end of the Cold War came with a surge of internal conflict and instability in many parts of the world, the fragile state is as much a construction of the Western political and academic discourse. Two, often intertwined, narratives thus emerge behind the fragile states discourse, which are often difficult to disentangle.¹⁰⁶ One is that of a ‘real’ and also enormously complex challenge of weak governance and chronic underdevelopment that has gradually begun receiving more international attention; the other is a subjective construction of deficient statehood, which has come to be juxtaposed to an ideal notion of statehood, and regularly exposed as a threat to Western security interests.

The end of the Cold War both brought about and brought to light the increasing “discrepancies between the outward forms and the inward substance of sovereign states” in many parts of the world.¹⁰⁷ On the one hand, the instability and pathologies of the “post-colonial state” often became apparent only with the retreat of support from Western or communist countries.¹⁰⁸ Before, the weak institutional apparatus of the military regimes, dictatorships, and one-party states which had come to dominate the political landscape in Africa and elsewhere since the 1970s had been kept artificially alive through outside support. The wave of democratization that swept

¹⁰⁶ Other authors also point to a combination of empirical changes and changing perceptions and policy preferences to account for the sudden interest with fragile states. For instance, EDWARD NEWMAN, 'Failed States and International Order: Constructing a Post-Westphalian World', 90 *Contemporary Security Policy*, 421 (2009), at 437; or MACRAE, et al., 'Aid to 'Poorly Performing' Countries: A Critical Review of Debates and Issues', at 5, identifying as driving factors a combination of “changes in the political economy of a significant number of low-income countries”, and “changes in the global political environment [...] marked by shifting interpretations of the limits and scope of states’ sovereignty”.

¹⁰⁷ JACKSON, *Quasi-states. Sovereignty, International Relations and the Third World*, p. 24.

¹⁰⁸ See, for instance, CRAWFORD YOUNG, 'The End of the Post-Colonial State in Africa? Reflections on the Changing African Political Dynamics', 103 *African Affairs*, 23 (2004), arguing that since African states were profoundly transformed by the reordering of politics after the collapse of the Soviet Union.

through the developing world in the 1990s produced new governments that still struggled to keep up with demands for market liberalization and the pressures of globalization. In Eastern Europe, the sudden breakup of the Soviet Union and the Socialist Federal Republic of Yugoslavia also resulted in a spur of nationalist sentiments that had previously been suppressed, and that produced successor states facing difficulties to consolidate. On the other hand, a general sense of euphemism over “the end of history” (Fukuyama) and the triumph of the Western liberal political and economic system paved the way for a more overt universalization of that particular system. The end of the Cold War thus entailed significant shifts both in terms of political economy, and regarding the international political environment in which policies are formulated and implemented.

Against this background, Robert H. Jackson was probably the first international relations scholar who turned from the pathologies of the “post-colonial state” to a broader conceptualization of statehood at the fault lines between factual manifestation and legal status, between empirical statehood and juridical statehood.¹⁰⁹ In 1990, Jackson argued that a large number of developing countries were merely “quasi states” since they were unable to fulfill even the most basic functions of a state, but were supported from above by international law and financial aid.¹¹⁰ Quasi states possessed the legal status of states, participated in international organizations, and were protected by the principle of sovereignty, but they were lacking the institutional features of sovereign states and the actual capacity to exercise sovereign rights.¹¹¹

While Jackson had highlighted that material differences and empirical variations among states were not new, the sudden and rapidly increasing attention to “failed states” in the early 1990s initially seemed to suggest the emergence of an unknown challenge, a looming threat of “the coming anarchy”.¹¹² With a view to the civil war,

¹⁰⁹ Jackson’s ideas have been taken up and elaborated elsewhere. For example: CHRISTOPHER CLAPHAM, *Africa and the International System. The Politics of State Survival* (Cambridge University Press, 1996); or JEFFREY HERBST, ‘Responding to State Failure in Africa’, 21 *International Security*, 120 (1996).

¹¹⁰ JACKSON, *Quasi-states. Sovereignty, International Relations and the Third World*, at 5. Jackson unfolds his key argument with reference to the development regime, which “presupposes a new type of sovereign state which is independent in law but insubstantial in reality and materially dependent on other states for its welfare.” See also *infra* note 238.

¹¹¹ *Ibid.*, p. 21. On the concepts of negative and positive sovereignty in detail, see p. 27 and p. 29 respectively. See also ROBERT H. JACKSON & CARL G. ROSBERG, ‘Sovereignty and Underdevelopment: Juridical Statehood in the African Crisis’, 24 *The Journal of Modern African Studies*, 1 (1986).

¹¹² Robert Kaplan, an American writer, captures his experience from a trip to Sierra Leone and Liberia in an essay titled “The Coming Anarchy”. ROBERT D. KAPLAN, ‘The Coming Anarchy. How Scarcity,

humanitarian crisis, and UN intervention in Somalia, Helman and Ratner coined the term 'failed state' for what they understood as a new phenomenon, a state "utterly incapable of sustaining itself as a member of the international community".¹¹³

In the following years, however, the international community witnessed the ensuing Bosnian War, how Liberia and Sierra Leone were racked by small-scale conflicts, and the genocide in Rwanda with its destabilizing effects on the Great Lakes region. It became clear that state failure was not a problem confined to Somalia, and the failed state discourse soon picked up on the historical antecedents of weak statehood.¹¹⁴

While the analytical value of treating countries as "failed" that had never "remotely resembled the ideal type of the modern Western polity" was thus questionable,¹¹⁵ state failure continued to draw attention particularly in (security) policy-oriented literature.¹¹⁶ The international community's attempts at restoring security and order through military intervention and robust peace-keeping in Somalia or Rwanda in the early 1990s had proven moderately successful at best. At the same time, though the total collapse of state authority remained a rare occurrence, the proliferation of non-international armed conflicts and protracted humanitarian crises that were soon described as complex emergencies continued. At the UN, collapsing state institutions and the resulting breakdown of law and order were identified as

Crime, Overpopulation, Tribalism, and Disease are Rapidly Destroying The Social Fabric of our Planet', in *The Atlantic* (February 1994).

¹¹³ HELMAN & RATNER, 'Saving Failed States', 3 *et seq.*, arguing that through the breakdown of government, widespread poverty and violence, states were descending into anarchy, resulting in the deprivation of citizens' rights and the threat of destabilizing neighboring countries and regions. Examples of failed states were Haiti, Yugoslavia, the USSR, Somalia, Sudan, Liberia and Cambodia.

¹¹⁴ William Zartman, a renowned Africanist, studies the crises of many African states since independence, including the DRC of the 1960s; Chad, Ghana and Uganda during the early 1980s; and Somalia, Liberia and Ethiopia of the early 1990s. Zartman defines state collapse as "a situation where the structure, authority (legitimate power), law, and political order have fallen apart". IRA WILLIAM ZARTMAN, 'Introduction: Posing the Problem of State Collapse', in Ira William Zartman (ed) *Collapsed States. Disintegration and Restoration of Legitimate Authority* (Lynne Rienner Publishers, 1994), p. 1.

¹¹⁵ ENGLEBERT & TULL, 'Postconflict Reconstruction in Africa Flawed Ideas about Failed States', at 111. Also *supra* chapter I.2 a).

¹¹⁶ E.g. the Harvard University's Failed States Project, conducted under the aegis of Robert Rotberg between 1998 and 2002. The Failed States Project distinguishes between weak, failing, failed and collapsed states based on their ability to delivering political goods to their citizens (p. 2). Symptoms of state failure included a list as diverse as prevailing violence, flawed institutions and a lack of control over the peripheries, economic deprivation, a deteriorating infrastructure, loss of legitimacy and disharmony between communities. ROBERT I. ROTBERG (ed) *When States Fail. Causes and Consequences* (Princeton University Press, 2004), pp. 5-9, and with country case studies, ROBERT I. ROTBERG (ed) *State Failure and State Weakness in a Time of Terror* (World Peace Foundation, 2003).

central features of a new breed of conflict in the 1992 “Agenda for Peace”, which also advocated the shift to a positive understanding of peace and to conflict prevention.¹¹⁷

In the international development community, the mid-1990s brought an enhanced interest in what sort of state institutions and government policies could support economic development. Not only did the model of the developmental state that could effectively generate and manage economic policies experience a small renaissance,¹¹⁸ but to further development, governments were now expected to deliver good governance, typically understood in terms of transparent and accountable management of public resources and respect for the rule of law.¹¹⁹ Both concepts – that of the developmental state and good governance – framed the evolving approach to state fragility, in that they forged a conception of the ideal type of state and governance that came to be juxtaposed to fragile and failed states.¹²⁰

It is a single event, however, that significantly increased the focus on weak statehood in the international security and development community: the terrorist attacks on the United States of September 11th, 2001. “America is now less threatened by conquering states than by failing ones”, the US government found in its National Security Strategy of 2002.¹²¹ The terrorist attacks had been launched from Afghanistan, where retreating statehood appeared to have provided fertile grounds for the responsible terrorist group Al Qaeda. In a report released in 2004, the UN

¹¹⁷ An Agenda for Peace. Preventive Diplomacy, Peacemaking and Peace-Keeping. Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992. UN Doc. A/47/277 - S/24111 (17 June 1992); and on peace as a foundation for development, see the subsequent report B. Boutros-Ghali, Agenda for Development, Report by the Secretary General, UN Doc. A/48/935 (May 6, 1994), paras. 16-40.

¹¹⁸ Already since the 1970s, particularly regional studies scholars had enquired into the institutional structures and government policies believed to support the sort of fast-paced, economic development witnessed in South-East Asia. Examples of the now voluminous literature on the role of the state in the East Asian economic miracle and the model of the developmental state include PETER EVANS, *Embedded Autonomy: States and Industrial Transformation* (Princeton University Press, 1995); and ADRIAN LEFTWICH, 'Bringing Politics Back In: Towards a Model of the Developmental State', 31 *Journal of Development Studies*, 400 (1995).

¹¹⁹ An important turning point was the publication of a World Bank study in 1989, which found that “[u]nderlying the litany of Africa’s development problems is a crisis of governance.” THE WORLD BANK, *Sub-Saharan Africa: From Crisis to Sustainable Growth. A Long-Term Perspective Study* (1989), p. 60. On the emergence of good governance as a “guiding principle of statehood”, see RUDOLF DOLZER, 'Good Governance: Neues transnationales Leitbild der Staatlichkeit?', 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 535 (2004), and *infra* chapter II.2 a).

¹²⁰ There is thus a close link in the 1990s between shifting aid policies, for instance the increasing use of conditionality and selectivity in development aid, and broader trends in international relations, whereby it became more accepted for external actors to become concerned with the political system and performance of a state, and to intervene in matters that used to be seen as part of the state’s *domaine réservé*. See MACRAE, et al., *Aid to 'Poorly Performing' Countries: A Critical Review of Debates and Issues*, 14.

¹²¹ National Security Strategy, Washington D.C., 2002.

provided a broad assessment of the threats that required collective international action – virtually all of them related in some way to weak statehood.¹²²

The “securitization” of weak statehood led powerful states and international organizations to devote increasing amounts of resources to the endeavors of rebuilding conflict-affected countries and stabilizing societies believed vulnerable.¹²³ Enhancing ‘state effectiveness’ through ‘state-building’ came to be seen as a panacea for the external and internal challenges associated with fragile states. Where Robert H. Jackson had spoken of a discrepancy between juridical and empirical statehood, Ashraf Ghani, former Minister of Finance and later President of Afghanistan, and Clare Lockhart, referred to a “sovereignty gap” as “the key obstacle to ensuring global security and prosperity”.¹²⁴ In their book with the ambitious title “Fixing Failed States”, Ghani and Lockhart argue that the international community must collectively work to strengthen the capacity of states to fulfill certain basic functions.¹²⁵ The central objective of the state-building agenda often followed the assumption that all states eventually had to converge towards the Western state model, with the state providing security, justice, and welfare to its citizens.¹²⁶ Necessarily, attention to state-building thus reinforced both a particular ideal of statehood and the construction of the “Other”, the fragile state that did not yet conform to this model.¹²⁷

¹²² United Nations Secretary General, *A More Secure World: Our Shared Responsibility*, Report of the High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (2004).

¹²³ NEWMAN, 'Failed States and International Order: Constructing a Post-Westphalian World', 434, whereby securitization is the “process by which issues are accorded security status or seen as a threat through political labeling, rather than as a result of their real or objective significance.”

¹²⁴ ASHRAF GHANI, et al., Overseas Development Institute, Working Paper 253, '*Closing the Sovereignty Gap: An Approach to State-Building*' (2005), at 4, and ASHRAF GHANI & CLARE LOCKHART, *Fixing Failed States. A Framework for Rebuilding a Fractured World* (Oxford University Press, 2008), 21, defining a sovereignty gap as the disjunction between the de jure assumption that all states are sovereign and the de facto reality that many are malfunctioning.

¹²⁵ GHANI, et al., '*Closing the Sovereignty Gap: An Approach to State-Building*', 4. There is a vast literature on state-building. See, for instance, FUKUYAMA, *State-Building. Governance and World Order in the 21st Century*; SIMON CHESTERMAN, et al. (eds), *Making States Work: State Failure and the Crisis of Governance* (United Nations University Press, 2005); see RICHARD CAPLAN, *International Governance of War-torn Territories. Rule and Reconstruction* (Oxford University Press, 2005); or ARMIN VON BOGDANDY, et al., 'State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches', 9 *Max Planck Yearbook of United Nations Law*, 579 (2005).

¹²⁶ E.g. JEAN D'ASPREMONT, 'Post-conflict Administrations as Democracy-building Instruments' *Chicago Journal of International Law*, 1 (2008), pointing out that externally supported state-building e.g. in Bosnia-Herzegovina and Kosovo, has always been aimed at building democratic states.

¹²⁷ In her insightful book on “Decolonizing International Law”, Sundhya Pahuja notes that labeling some states as failed in turn served to maintain the integrity and monopoly of statehood itself, since “nation states that ‘failed’ did not challenge the orthodoxy that nation statehood was the natural form of collective politico-territorial organization, but were instead narrated away as not yet developed enough to achieve and maintain the nation state form.” SUNDHYA PAHUJA, *Decolonizing International Law*:

The state-building agenda was accordingly criticized for its patronizing, neo-colonialist undertones, and for being mistakenly technical and too much focused on the formal institutions of the state.¹²⁸ The moderate success of the international community's ambitious state-building projects from Kosovo to Afghanistan and Iraq soon provided evidence for the limitations of the approach and its underlying assumptions.¹²⁹ It was partly attributed to an insufficient understanding not just of the political economy of conflicts, but of the local power structures and sources of legitimacy in these states more generally – that is, of the particular variations of empirical statehood.¹³⁰

Next to external state-building interventions, development and humanitarian assistance gained in importance as elements of a comprehensive strategy to prevent conflict, strengthen state capacity, and meet citizens' basic needs in fragile states. Already in 2001 – prompted by the policy shifts of the United States, its major shareholder – the World Bank had established a task force to analyze the specific development challenges of fragile states, the “Low-Income Countries Under Stress” (LICUS) initiative.¹³¹ In his 2007 work on the “Bottom Billion”, the estimated

Development, Economic Growth and the Politics of Universality (Cambridge University Press, 2011), at 80.

¹²⁸ E.g. DAVID CHANDLER, 'Great Power Responsibility and "Failed States": Strengthening Sovereignty?', in Julia Raue & Patrick Sutter (eds), *Facets and Practices of State-Building* (Martinus Nijhoff, 2009), 19, arguing that behind the objective of fostering state “capacities”, re-conceptualizing sovereignty as “responsibility”, and asserting the leadership of government partners in fragile states, they suspected the “desire on behalf of Western states to avoid direct accountability for policy interventions”. Prominent critics include also RALPH WILDE, *International Territorial Administration. How Trusteeship and the Civilizing Mission Never Went Away*, 1. publ. (Oxford University Press, 2008); CAPLAN, *International Governance of War-torn Territories. Rule and Reconstruction*; CLAPHAM, 'Degrees of Statehood'; and SIMON CHESTERMAN, 'International Territorial Administration and the Limits of Law', 23 *Leiden Journal of International Law*, 437 (2010). For an overview of recent literature on the failings of Western state-building and development interventions, see NEIL COOPER, 'Review Article: On the Crisis of the Liberal Peace', 7 *Conflict, Security & Development*, 605 (2007), 606.

¹²⁹ On lessons learned, see, for instance, FRANCIS FUKUYAMA (ed) *Nation-Building. Beyond Afghanistan and Iraq* (Johns Hopkins University Press, 2006).

¹³⁰ For a critique of the “fetishization of state capacity” in the earlier state-building literature, see, for instance, SHAHAR HAMEIRI, 'Regulatory Statebuilding and the Transformation of the State', in David Chandler & Timothy Sisk (eds), *Routledge Handbook on International Statebuilding* (Routledge, 2013), at 54-57.

¹³¹ The LICUS task force promoted the understanding that building effective and legitimate state institutions is not only a prerequisite for development progress, but also a measure of conflict prevention, given the proclivity of LICUS to become failed states and terrorist havens. See the LICUS Task Force Report (2002). Notably, the IDA's commitments to fragile and conflict-affected states more than doubled immediately after fiscal year 2001. See INDEPENDENT EVALUATION GROUP, *The World Bank, 'World Bank Assistance to Low-Income Fragile- and Conflict Affected States'* (2013), Figure 3.1 (p. 26). On the World Bank's and OECD's increasing focus on fragile states post 9/11, see also STEPHEN BARANYI & MARIE-EVE DESROSIERS, 'Development Cooperation in Fragile States: Filling or Perpetuating Gaps?', 12 *Conflict, Security & Development* 443 (2012), 443, 446.

combined population of all fragile states, Collier argued that some states were caught in traps that prevented them from achieving development: the conflict trap, the natural resource trap, the landlocked with bad neighbors trap, and the bad governance in a small country trap.¹³² Since then, development actors have increasingly seized the topic from the exclusive grasp of security experts, and reframed it. The assumption that weak statehood constitutes a major threat to international security has given way to a more nuanced picture,¹³³ and in 2009, World Bank President Robert Zoellick declared fragile states are “the toughest development challenge of our era” – one that requires the international community to think anew about the nexus between economics, security, and governance.¹³⁴

The lessons learned from overly ambitious state-building interventions, together with vigorous analysis of why traditional models of development cooperation proved often ineffective or counterproductive in fragile states, have contributed to a gradually more refined understanding of the phenomenon. There is now a growing recognition that allegedly weak states can display multiple forms of social organization, wherein non-state actors and de-centralized modes of service provision gain in importance. Accordingly, fragile states are not so much characterized by a political vacuum or “sovereignty gap” than by different forms of governance that assume controlling and allocating functions.¹³⁵ Since non-state actors and informal institutions frequently take on some of the state’s functions in terms of service delivery, generally confined to parts of the territory or population, it appears necessary to distinguish between the

¹³² COLLIER, *The Bottom Billion. Why the Poorest Countries are Failing and What Can Be Done About It*, p. 4. Collier also contributed to an influential study that estimated the combined cost of state failure or fragility for the international community at around 276 billion USD per year. LISA CHAUVET, et al., United Nations University WIDER Research Paper No. 2007/30, *'The Costs of Failing States and the Limits to Sovereignty'* (2007). See also DARON ACEMOGLU & JAMES ROBINSON, *Why Nations Fail. The Origins of Power, Prosperity, and Poverty* (Crown Business, 2012), who provide a comprehensive account of the importance of political and economic institutions for economic development and thus explain ‘why nations fail’.

¹³³ For instance, Stewart Patrick argues that terrorist networks and international organized crime require the infrastructure of functioning states, and fragile states therefore pose a greater risk to their own people than they pose to international peace and security. STEWART PATRICK, *Weak Links: Fragile States, Global Threats, and International Security* (Oxford University Press, 2011). See also JAMES TRAUB, 'Think Again: Failed States', in *Foreign Policy* (June 20, 2011). Michael Mazarr finds that the concern with weak or fragile states in international security circles has always been “more of a mania than a sound strategic doctrine”, and is therefore gradually replaced with more long-term financial and technical assistance. MICHAEL J. MAZARR, 'The Rise and Fall of the Failed-State Paradigm. Requiem for a Decade of Distraction', in *Foreign Affairs* (January/February 2014).

¹³⁴ ROBERT B. ZOELLICK, 'Fragile States: Securing Development', 50 *Survival*, 67 (2009), 68-69.

¹³⁵ See, for example, the comprehensive study INSTITUTE OF DEVELOPMENT STUDIES, *'An Upside Down View of Governance'* (April 2010), and the findings of the Berlin-based research project on “Governance in Areas of Limited Statehood” in JOSEF BRAML, et al. (eds), *Einsatz für den Frieden. Sicherheit und Entwicklung in Räumen begrenzter Staatlichkeit* (Oldenbourg, 2010), 4.

“government“ on the one hand, and the exercise of “governance” – not confined to state actors – on the other.¹³⁶

In line with these findings, practitioners have shown a growing interest in opening the “black box” of the fragile state, and understanding state-society relations in situations where non-state actors assume key legitimizing functions of the state.¹³⁷ Not just the effectiveness of state institutions, their capacity to deliver certain core functions, have come to be seen as critical to an understanding of weak statehood, but also its authority and legitimacy. State legitimacy is mostly cast not as input-based, i.e. related to the democratic form of government, but output-based, i.e. based on the ability of the state to meet the needs and expectations of its citizens.¹³⁸

The evolution of such a gradually more pluralist and also more modest understanding of state fragility hits a temporary peak with the endorsement of the “fragile state” label by some of its nominees. In 2010, a group of fragile states announced the establishment of the g7+, an informal forum to exchange and promote their interest vis-à-vis international partners. The g7+ have since sought to define fragility not “through the lens of the developed”, but “through the eyes of the developing”, and to influence policy-making through a “fragile state perspective on fragility”.¹³⁹ Independent of how influential the g7+ initiative can be in redirecting the

¹³⁶ BRAML, et al. (eds), *Einsatz für den Frieden. Sicherheit und Entwicklung in Räumen begrenzter Staatlichkeit*, 5.

¹³⁷ OECD, 'The State's Legitimacy in Fragile Situations. Unpacking Complexity', 7, arguing that a “lack of legitimacy is a major contributor to state fragility because it undermines state authority, and therefore capacity”; also THE WORLD BANK, 'World Development Report: Conflict, Security, and Development', at 84. For an overview of what is meant by the concern with state-society relations in development cooperation, see the GSDRC synopsis available online: <http://www.gsdr.org/go/topic-guides/state-society-relations-and-citizenship/state-society-relations-overview> (accessed December 2014).

¹³⁸ OECD, 'The State's Legitimacy in Fragile Situations. Unpacking Complexity', p. 15, Basic Concepts. The OECD establishes that a lack of legitimacy undermines the state's authority and weakens its capacity, hence contributing to fragility. In the World Development Report 2011, the World Bank adopts a notion of legitimacy that “denotes a broad-based belief that social, economic, or political arrangements and outcomes are proper and just.” THE WORLD BANK, 'World Development Report: Conflict, Security, and Development', Glossary of Terms. However, many accounts of state fragility or failure still demonstrate a certain “democratic bias”, in that they link the form of government to the resilience of state institutions despite a lack of strong, scientific evidence. FELIX BETHKE, 'Zuverlässig invalide – Indizes zur Messung fragiler Staatlichkeit', 6 *Zeitschrift für vergleichende Politikwissenschaft*, 19 (2012).

¹³⁹ As of October 2014, the g7+ counts 20 members from four continents: Afghanistan, Burundi, Central African Republic, Chad, Comoros, Côte d'Ivoire, The Democratic Republic of the Congo, Guinea, Guinea Bissau, Haiti, Liberia, Papua New Guinea, Sao Tome and Principe, Sierra Leone, Solomon Islands, Somalia, South Sudan, Timor-Leste, Togo, and Yemen. See online, <http://www.g7plus.org/> (accessed December 2014). On the formation of the g7+ and their potential to influence and to overcome obvious asymmetries in political decision-making on conflict-affected and fragile states, see VANESSA WYETH, 'Knights in Fragile Armor: The Rise of the “G7+”', 18 *Global Governance*, 7 (2012); and *infra* chapter II.3 a).

discourse on fragile states, its establishment indicates that being classified as “fragile” is no longer seen as necessarily a disadvantage.¹⁴⁰

The conflation of competing interests and different social constructions, however, continues to render issues of conceptualization, definition, and measurement the most problematic aspects of the study of state fragility.¹⁴¹ Not only is it doubtful whether a multidimensional, fluid phenomenon like state fragility can meaningfully be captured in a single definition or index, without differentiating between different constellations.¹⁴² Perhaps inevitably, all accounts of state fragility are also based on a particular conception of the means and ends of statehood. For instance, drawing on Weber’s conception of the monopoly over the legitimate use of force, some accounts of state fragility concentrate on the state’s (in)ability to provide and maintain law and order. Others take a more comprehensive conception of statehood as a starting point, comparing fragile states with the Western model of liberal, democratic, rule of law-abiding, welfare states.

The majority of fragile states definitions draw on the social contract theory and accordingly look for the state’s capacity or will to fulfill certain basic functions towards its citizens.¹⁴³ The OECD, for example, defines states as “fragile when state structures lack political will and/or capacity to provide the basic functions needed for

¹⁴⁰ With an interesting case study on how developing countries can use the fragile states label for their purposes, e.g. to delay political reforms or to receive more donor funding, see JONATHAN FISHER, 'When it Pays to be a 'Fragile State': Uganda's Use and Abuse of a Dubious Concept', 35 *Third World Quarterly*, 316 (2014). It is important to note that many countries continue to refuse the fragile states terminology, and for that reason, refuse to join the g7+.

¹⁴¹ HARVEY STARR, 'Introduction to the CMPS Special Issue on Failed States', 25 *Conflict Management and Peace Science*, 281 (2008), 282-283; or BERTOLI & TICCI, 'A Fragile Guideline to Development Assistance', 212, arguing that “the loosely defined character of the concept of fragility is a disturbing feature from both an academic and a policy-oriented perspective, as it produces an unwarranted perception of coincidence”.

¹⁴² More recent proposals for measuring or defining fragility therefore seek to differentiate different dimensions of fragility (e.g. CHARLES T. CALL, 'Beyond the 'Failed State': Toward Conceptual Alternatives', 17 *European Journal of International Relations*, 303 (2010); or JÖRN GRAVINGHOLT, et al., German Development Institute, Discussion Paper 3/2012, 'State Fragility: Towards a Multi-Dimensional Empirical Typology' (2012)); or to conceptualize fragility not in terms of a lack of capacity, legitimacy, and insecurity, but only insecurity (e.g. JAMES PUTZEL, Crises States Research Center, 'Why Development Actors Need a Better Definition of 'State Fragility' (2010)).

¹⁴³ In contrast, some authors prefer a more sociological conception of the state in describing state fragility. For instance, based on Durkheim’s conception of the state as “the very organ of social thought”, the focus shifts to the dynamics of socio-political cohesion, rather than state institutions alone. See NICOLAS LEMAY-HÉBERT, 'Statebuilding without Nation-building? Legitimacy, State Failure and the Limits of the Institutional Approach', 3 *Journal of Intervention and Statebuilding*, 21 (2009); also TRUTZ VON TROTHA, 'The “Andersen Principle”: On the Difficulty of Truly Moving Beyond State-Centrism', in Martina Fischer & Beatrix Schmelzle (eds), *Building Peace in the Absence of States - Challenging the Discourse on State Failure* (Berghof Research Centre for Constructive Conflict Management, Dialogue Series 8, 2009), proposing to think of these states in terms of ‘hybrid political orders’.

poverty reduction, development and to safeguard the security and human rights of their populations”.¹⁴⁴ With its functional understanding of statehood, such definitions are not necessarily less biased than those that suppose the existence of specific institutions of liberal democracy. Certainly, most symptoms of state fragility may be reduced to the inability of the state to perform certain tasks in the realm of security, welfare, and rule of law:¹⁴⁵ from uncontrolled borders and high levels of crime, to deteriorating infrastructures and privatization of health and education systems, to self-enriching elites and corruption. Yet, functional definitions of statehood and state fragility may appear technical, but they often disguise questions that goes to the heart of every political system: what functions are expected from the state, and how do different functions – security, welfare, rule of law – relate to each other?

Ultimately, it appears nearly impossible to disentangle the two narratives that lay behind the evolving understanding of fragile states, and to “de-politicize” the notion.¹⁴⁶ Still, a glance at the evolving understanding of fragile states has also shown that a more nuanced understanding of the symptoms and drivers of state fragility is emerging. This understanding goes beyond the construction of state fragility as *aliud* of an ideal notion of statehood and as a threat to Western security interests. Instead, it involves an increasing sensitivity for alternative *loci* and modes of governance in fragile states, and informs a growing concern with the developmental effects of weak and unaccountable state institutions.¹⁴⁷ Not just the effectiveness of state institutions, their capacity to deliver certain core functions, have come to be seen as critical to an understanding of weak statehood, but also their authority and legitimacy in the eyes of

¹⁴⁴ See the definition in the OECD Principles for Good International Engagement in Fragile States & Situations, April 2007 (hereinafter *Fragile States Principles*). The OECD has proposed slightly different definitions in subsequent publications. See, for instance, the definition quoted in *supra* note 1.

¹⁴⁵ Most functional approaches roughly converge around these three core functions expected of a modern state. See, for instance, ULRICH SCHNECKENER, 'Fragile Staaten als Problem der internationalen Politik', 3 *Nord-Süd Aktuell*, 510 (2004), 513; GHANI & LOCKHART, *Fixing Failed States. A Framework for Rebuilding a Fractured World*, proposing 10 functions; JENNIFER MILLIKEN & KEITH KRAUSE, 'State Failure, State Collapse and State Reconstruction: Concepts, Lessons and Strategies', in Jennifer Milliken & Keith Krause (eds), *State Failure, Collapse and Reconstruction* (Blackwell, 2005), suggesting „security, representation and welfare“.

¹⁴⁶ Edward Newman raises similar questions: “Is it possible to make a distinction between the concept of failed states as represented in discourse, and the reality of failed states – that is, to de-politicize the concept?” NEWMAN, 'Failed States and International Order: Constructing a Post-Westphalian World', 421.

¹⁴⁷ Nay argues that the more refined understanding of state fragility is the result of processes of fragmentation and later assimilation, whereby a concept that has been appropriated by several international actors is first contested and subjected to various interpretations, and later refined and adapted to incorporate additional insights. OLIVIER NAY, 'International Organisations and the Production of Hegemonic Knowledge: How the World Bank and the OECD helped invent the Fragile State Concept', 35 *Third World Quarterly*, 210 (2014).

the population, and state-society relations more broadly.¹⁴⁸ No matter whether the notion of fragile state is thus a viable category or concept, however, or remains a “‘trading language’ to talk about complex social realities too heterogeneous for theoretical agreement”,¹⁴⁹ it still has an impact on international policy-making. We return to this in chapter II.

3. Legal Grasp on Fragile States

“The State has two aspects: rest and movement, continuance and progress, body and spirit.” – Johann Kaspar Bluntschli, 1895¹⁵⁰

Unlike empirical-sociological accounts of statehood, legal scholars conceive of the state not as a variable or an aggregate of social conditions or events, but as part of the law – law stands for and guarantees the aspects of rest, continuance, and body. Whereas the emergence of states may be a historical and sociological process, international law transforms the empirical situation into a legal condition as soon as it attaches legal consequences to the existence of states.¹⁵¹ Once attained, the legal status of statehood is static and in principle does not reflect the empirical variances between states in terms of form or function, capacity or performance.

In the following, I start with a brief introduction to the juridical concept of statehood (a), which explains why international law scholars have approached the

¹⁴⁸ MACRAE, et al., *'Aid to 'Poorly Performing' Countries: A Critical Review of Debates and Issues'*, pp. 46-50. For instance, the World Bank defines fragility and fragile situations in the World Development Report 2011 as “[p]eriods when states or institutions lack the capacity, accountability, or legitimacy to mediate relations between citizen groups and between citizens and the state, making them vulnerable to violence.” THE WORLD BANK, *World Development Report: Conflict, Security, and Development*, Glossary of Terms; see also ALEXANDRE MARC, et al., *Societal Dynamics and Fragility. Engaging Societies in Responding to Fragile Situations* (The World Bank, 2013), looking at fragility not just as a problem of state capacity, but also of relationships within society.

¹⁴⁹ NEHAL BHUTA, 'Governmentalizing Sovereignty: Indexes of State Fragility and the Calculability of Political Order', in Kevin E. Davis, et al. (eds), *Governance by Indicators. Global Power Through Quantification and Rankings* (Oxford University Press, 2012), at 135.

¹⁵⁰ JOHANN-CASPAR BLUNTSCHLI, *The Theory of the State* (Clarendon, 1895), 66-67, continuing: “There are two political sciences corresponding to this internal distinction, Public Law and Politics”.

¹⁵¹ From a thoroughly positivist standpoint as represented by Hans Kelsen in his “General Theory of the State”, the state comes to be identified with the legal order: “The State is then taken into consideration only as a legal phenomenon, as a juristic person, that is as a corporation. Its nature is thus in principle determined by our earlier definition of the corporation. The only remaining question is how the State differs from other corporations. The difference must lie in the normative order that constitutes the State corporation.” (181). This leads Kelsen to claim that “[t]here is no sociological concept of the State besides the juristic concept” (188). HANS KELSEN, *General Theory of Law and State* (Harvard University Press, 1949).

topic of failed or fragile states with considerable caution, and why a juridical translation of state fragility remains of limited value (b).

a) Juridical Statehood – The Wonderful Artificiality of the State

The main difference between empirical and juridical statehood is aptly described by James Crawford in his seminal work on statehood in international law: “A State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules or practices.”¹⁵² If juridical statehood can thus be distinguished from empirical statehood, this raises two questions: what does the legal status consist in, and what are the rules or practices on the basis of which the status is granted?

First, international law recognizes the state as a legal person. As such, the state obtains the capacity to be a bearer of rights and duties under international law.¹⁵³ Unlike other persons or entities that can bear rights and duties under international law, the state is not merely a passive recipient, but also an active participant in the international legal order. States constitute “the gatekeepers and legislators of the international system”, and, importantly, its principal enforcers.¹⁵⁴

The mutual role of states as both constitutive units and subjects of international law naturally poses a challenge to the conceptualization of states under international law. For instance, it has been subject to controversy whether there can be a legal concept of statehood if states are both the antecedents and the products of international law.¹⁵⁵ Crawford seeks to respond to this controversy by identifying the legal characteristics that constitute the core of juridical statehood: the competence to perform acts on the international level, in particular to conclude treaties; the exclusive competence to regulate internal affairs, subject only to restrictions posed by international law; the freedom not to be subjected to compulsory jurisdiction, other

¹⁵² CRAWFORD, *The Creation of States in International Law*, 5.

¹⁵³ ICJ in *Reparations for Injuries Suffered in the Service of the United Nations* case, advisory opinion [1949] ICJ Rep. 174 at 178. Capacity refers to the legal, not the factual capacity to be the bearer of rights and duties under international law.

¹⁵⁴ CRAWFORD, *The Creation of States in International Law*, 29; MALCOLM N. SHAW, *International Law*, 5th (Cambridge University Press, 2003), 181. Of course, the proliferation of international organizations, courts and tribunals, as well as other international, national or transnational public and private actors who contribute to shaping the international legal order has challenged the state’s monopoly in this regard.

¹⁵⁵ E.g. MATHEW CRAVEN, ‘States and Recognition in International Law’, in Malcolm D. Evans (ed) *International Law* (Oxford University Press, 2010), 218.

than by consent; and the right to be regarded as equal to other states under international law.¹⁵⁶

While these attributes serve to specify the particular form of standing that only states enjoy under international law, they should not be confounded with a set of fundamental rights and duties of states inherently linked to their legal status.¹⁵⁷ Rather than constituting a set of rights, Crawford argues that the legal status granted to states under international law amounts to a “[presumption] as to the existence of such rights, powers, or capacities, rules that these exist unless otherwise stipulated.”¹⁵⁸ The legal status of statehood thus amounts to no more or less than a “legally circumscribed claim of right.”¹⁵⁹

This somewhat intricate differentiation is important to bear in mind when examining the significance of state fragility from a legal perspective. It allows distinguishing between the (categorical) legal status of the state, and the specific role the state assumes as primary subject of international law. The role of the state – its “extent of powers, rights and responsibilities” – is variable in as much as states take on different rights and obligations under international law.¹⁶⁰ These variations, however, do not concern the legal status of state.

If statehood is not merely presupposed by international law, the second question concerns the rules and practices that exist to determine whether an entity constitutes a state. The legal status of statehood is generally granted on the basis of three criteria, which were first established by Georg Jellinek in his doctrine of the three elements (*Drei-Elementen-Lehre*): a defined territory, a permanent population, and a

¹⁵⁶ CRAWFORD, *The Creation of States in International Law*, 40-42. In a similar vein, Shaw identifies independence, equality, and the right to peaceful co-existence as the outstanding characteristics of states under international law. SHAW, *International Law*, 189.

¹⁵⁷ Some scholars posit a theory of fundamental rights and duties of states that is grounded in natural law, which is, however, disputed. SERGIO M. CARBONE & LORENZO SCHIANO DI PEPE, 'Fundamental Rights And Duties of States', in Rüdiger Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, January 2009).

¹⁵⁸ CRAWFORD, *The Creation of States in International Law*, 44.

¹⁵⁹ *Ibid.*, 61.

¹⁶⁰ For instance, a state can agree to limit its powers by means of a binding agreement with other states or membership in an international organization. As long as the state's legal independence from other states is maintained, the ICJ has established that its legal status remains unaffected. See *Military and Paramilitary Activities in and against Nicaragua Case [Nicaragua v United States of America]* [Merits] [1986] ICJ Rep 131. In his Advisory Opinion in the *Austro-German Customs Union Case* (PCIJ ser A/B no 41 (1931), 57-8), Judge Anzilotti has further defined independence: “[R]estrictions upon a State's liberty, whether arising out of ordinary international law or contractual engagements, do not as such in the least affect its independence. As long as these restrictions do not place the State under the legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be.”

government exercising effective control over the territory and population.¹⁶¹ These criteria also inform the Montevideo Convention on the Rights and Duties of States, the most widely cited, textual basis for a definition of statehood until today.¹⁶²

For the purposes of this thesis, we can skip the first two criteria,¹⁶³ and go straight to ‘effective government’ as the central constituting principle of statehood.¹⁶⁴ In order to qualify as a state, an entity must have a government in general and exclusive control of its territory and with the ability to maintain law and order. The government is also the central organ by which the state acts on the international level. Effective government thus entails two aspects, both of which are important from the perspective of international law. Internally, a government is essential for enforcing international law domestically. Externally, the existence of a government remains the precondition for the state to act autonomously and legally independent from other states on the international plane, and to represent its people in international relations.

¹⁶¹ GEORG JELLINEK, *Allgemeine Staatslehre* (Julius Springer, 1922), p. 394. Other criteria are sometimes proposed as substitutes or complements, for instance, independence (to connote that a state is subject to no other authority than that of international law), or permanence (to emphasize that a state needs to show a certain continuance over a period of time). See SHAW, *International Law*, 181-182, arguing that independence constitutes the essence of legal capacity; or The American Law Institute’s Second Restatement, which demands that an entity “shows reasonable indications that the(se) requirements [...] will continue to be satisfied” (Restatement 2nd, Foreign Relations Law of the US (1965), s 100 – 91.

¹⁶² Convention on the Rights and Duties of States, Montevideo, 26 December 1933, 165 LNTS 19, Article 1: “The state as a person in international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states” The fourth criterion is usually subsumed under the requirement of effective government, since it is rather a consequence than a requirement of statehood. Though the Montevideo Convention has been ratified by only a small number of South American states, Article 1 has become the generally accepted definition of statehood – perhaps for a lack of alternatives, as Thomas Grant argues the definition is ‘highly contingent upon the history, politics, and legal thought of its moment. It is over-inclusive, under-inclusive, and outdated.’ THOMAS D. GRANT, ‘Defining Statehood: The Montevideo Convention and its Discontents’, 37 *Columbia Journal of Transnational Law*, 403 (1999), 453.

¹⁶³ It suffices to note that international law makes no specification as to the required size of the population or territory, even if states with very small populations or territories (so-called micro or mini states) “may cast doubts on a State’s ability to comply with certain requirements of membership in international organizations.” KREIJEN, *State Failure, Sovereignty and Effectiveness. Legal Lessons from the Decolonization of Sub-Saharan Africa*, 19. On the criteria of permanent population and coherent territory in general, see IAN BROWNLIE, *Principles of Public International Law*, 7th Edition (Oxford University Press, 2008), 70-71; or CRAWFORD, *The Creation of States in International Law*, pp. 46-54.

¹⁶⁴ BROWNLIE, *Principles of Public International Law*, 71; CRAWFORD, *The Creation of States in International Law*, 42. Government is the central criterion in that all other elements depend on it: territory is defined by international law with regards to territorial jurisdiction, i.e. the extent the government’s power extends over a geographical area or population. On the effective government criterion in detail, see also FRANZ LEIDENMÜHLER, *Kollabierter Staat und Völkerrechtsordnung. Zur Aktualität der Westfälischen Ordnung, entwickelt an Fragen des Wegfalls effektiver Staatsgewalt* (NWV Verlag, 2011), pp. 97-103 and 149-153.

Despite its central importance, what ‘effective government’ requires in international law is not easily established. As the concept implies, international law looks for the effectiveness of a government, and not so much its legality or legitimacy – at least traditionally.¹⁶⁵ There is no legal rule that prescribes the form or internal constitution of a government, and states are free to choose their political, economic and social system.¹⁶⁶ In contrast, international law does require at least some centralized authority that is vested with the basic institutions and capacities necessary to uphold the monopoly on the use of force and effectively perform governmental functions.¹⁶⁷ As justice Max Huber notes in the *Island of Palmas* case: “International law, the structure of which is not based on any super-state organization, cannot be presumed to reduce a right such as territorial sovereignty [...] to the category of an

¹⁶⁵ JAMES CRAWFORD, 'State', in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* January 2011), para. 14. The legality of a government has come to matter in certain cases, for example when Rhodesia was not recognized as a state by a majority at the United Nations since it was established on racial ideology. In turn, the claim that the legitimacy of a government does not matter for the creation of state is increasingly contested, and some authors have proposed to condition the recognition of states or governments on whether they enjoyed popular support. See, for instance, GREGORY FOX, 'The Right to Political Participation in International Law', 17 *Yale Journal of International Law*, 539 (1992), arguing that only democratic governments should be accredited at the UN; or GREGORY H. FOX & BRAD R. ROTH, 'Democracy and International Law', 27 *Review of International Studies*, 327 (2001), proposing the collective non-recognition of undemocratic states and governments. For a more nuanced view, see ANNE PETERS, 'Statehood after 1989: 'Effectivités' between Legality and Virtuality', in James Crawford & Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law* (Oxford University Press, 2010), 182, who finds that effectiveness is a necessary, but not sufficient criterion of statehood, and must be complemented, but not substituted by considerations of legitimacy; or JURE VIDMAR, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice* (Oxford University Press, 2013), arguing that we need to understand the emergence of new states as a law-governed, political process, in which democratic requirements can be equally relevant or irrelevant as the traditional criteria of statehood. In sum, although there is an undeniable trend in state practice of recognition to consider a government's legitimacy in addition to its effectiveness, this trend concerns the political act of recognition alone, and is not sufficient to have modified the legal doctrine of statehood.

¹⁶⁶ Western Sahara Advisory Opinion, ICJ Reports 1975, para 94: “No rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evidenced from the diversity of the forms of State found in the world today.” The right to choose and to develop its internal system independently is, however, circumscribed by the principles of international law. ALFRED VERDROSS & BRUNO SIMMA, *Universelles Völkerrecht: Theorie und Praxis* (Duncker & Humblot, 1984), 275.

¹⁶⁷ In the Aaland Islands case (1920), LNOJ Sp. Supp. No. 4, pp. 8-9, an international dispute settlement under the League of Nations, it was found that Finland could be considered a sovereign state only when “a stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the state without the assistance of the foreign troops.” See also: American Law Institute, Restatement of the Law, Vol. I, § 201, Comment d; and CRAWFORD, *The Creation of States in International Law*, 59, who maintains that a state required “competence, within its own constitutional system, to conduct international relations with other states, as well as the political, technical, and financial capabilities to do so”. In contrast, Shaw highlights “[some form of government or central control] should be regarded more as an indication of some sort of coherent political structure and society, than the necessity for a sophisticated apparatus of executive and legislative organs”, SHAW, *International Law*, at 180 (referring to the Western Sahara Case, pp. 12, 43-44).

abstract right, without concrete manifestations.”¹⁶⁸ The nature and extent of control required from a government in order to be ‘effective’ for the purposes of international law, however, are nowhere stipulated.¹⁶⁹

Against this background, the requirement of effective government is at the same time the most central, and the least stringently applied criterion of statehood. Effective entities have existed that were denied the legal status of states, just as entities that hardly exercised effective control were (still) accepted as states under international law.¹⁷⁰ While some of these cases may appear exceptional, others demonstrate that the effective government criterion is not absolute, but can be outweighed by other principles under certain circumstances.¹⁷¹ Where the continuity of established and recognized states is concerned, rather than the creation of new states, the criterion can be outweighed by the principle of continuity.¹⁷² Accordingly, a temporary loss of effective control or disappearance of government, for instance during external occupation or internal conflict, does not automatically lead to the extinction of the state. Moreover, the conferral of legal personality to newly independent states whose governments hardly exercised effective control has constituted a trend that has since been reinvigorated by international practice vis-à-vis the successor states of former Yugoslavia.¹⁷³ Accordingly, the principle of self-

¹⁶⁸ Permanent Court of Arbitration, Arbitral award relating to the arbitration of differences respecting sovereignty over the Island of Palmas, 4. April 1928 (Netherlands vs. United States of America), 22 AJIL 1929, 867 ff., at 876.

¹⁶⁹ See CRAWFORD, *The Creation of States in International Law*, 60, and with some indications of the types of institutions and capacities required, the references provided in *supra* note 167.

¹⁷⁰ CRAWFORD, 'State', at 46. Crawford proposes Rhodesia/Zimbabwe, Taiwan, the Turkish Republic of Northern Cyprus as examples for the former category, to which one could add, for instance, Somaliland. As examples for the latter category, Crawford counts various entities unlawfully annexed in the period 1936–1940 (e.g. the Baltics or Poland), Guinea-Bissau before its recognition by Portugal, and Kuwait during the Iraq-Kuwait War in 1990–1991, and earlier, the conferral of statehood to the formal Belgian Congo (at 23). In more detail, see also CRAWFORD, *The Creation of States in International Law*, 56–59.

¹⁷¹ PETERS, 'Statehood after 1989: 'Effectivités' between Legality and Virtuality', at 182.

¹⁷² CRAWFORD, *The Creation of States in International Law*, 59. Even in cases where important governmental functions are carried out by another state or international organization on its behalf, as has been discussed with regards to international territorial administrations, the state can continue to be sovereign (32). On the principle of continuity, sometimes seen as bolstered by the principle of self-determination, and how it is balanced with the principle of effectiveness in the context of state collapse, see also SIEGFRIED MAGIERA, 'Governments', in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (September 2007), para. 17. On the role of the principle of continuity in the context of state failure, see also *infra* note 185.

¹⁷³ Both Croatia and Bosnia and Herzegovina were recognized by members of the European Union and admitted into the United Nations at a time when their respective governments did not control substantial areas of their territories during civil war.

determination can compensate for lower levels of government effectiveness, at least in the context of decolonization.¹⁷⁴

In sum, we can clearly distinguish juridical statehood from empirical statehood with regard to its consequences: primarily, to grant an entity international legal status. This status is the same for all states, and thus secures the state as a necessary form or structure of authority regardless of its specific praises as the “wonderful artificiality of the state”: the formality of the concept of juridical statehood allowed distinguishing “the state as the realization of Utopia, and the state as the form in which different Utopias clash today”.¹⁷⁵ Ideally, sovereign statehood protects the state as a location where these clashes over competing societal visions can take place – a reason why international legal scholars continue supporting the formal trappings of sovereign statehood.¹⁷⁶

Fault lines between juridical and empirical statehood appear, however, when turning to the criteria on the basis of which the legal status of statehood is conferred. The legal definition of statehood is necessarily premised on the existence of empirical facts. This is not only because states were generally empirical realities before they assumed legal personality. As a decentralized legal order, international law relies on states possessing certain actual capacities in order to implement its norms domestically, to exercise legal rights and fulfill obligations. Accordingly, the principle of effectiveness assumes a central, constituting role for the criteria of statehood, and serves “a genuinely normative function” for the legal order as a whole.¹⁷⁷ Effectiveness acts as a bridge between facts and norm, in that it ascribes legal

¹⁷⁴ SHAW, *International Law*, pp. 183-185.

¹⁷⁵ KOSKENNIEMI, 'The Wonderful Artificiality of States', p. 28 and *in passim*. For Koskenniemi, the state is important as a location, a pure form, through which we can examine the consequences and acceptability of the various jargons of authenticity and enable political action. See also OSCAR SCHACHTER, 'The Decline of the Nation-State and its Implications for International Law', 36 *Columbia Journal of Transnational Law*, 7 (1998), 22, and CRAVEN, 'States and Recognition in International Law', 205.

¹⁷⁶ In contrast, Korhonen doubts that in light of its historical contingency, the state is the “neutral structure, which the classic and the formalist doctrines of state constitution seem to assume”. KORHONEN, 'The 'State-Building Enterprise': Legal Doctrine, Progress Narratives and Managerial Governance', 27.

¹⁷⁷ PETERS, 'Statehood after 1989: 'Effectivités' between Legality and Virtuality', 174. See also the discussion in KREIJEN, *State Failure, Sovereignty and Effectiveness. Legal Lessons from the Decolonization of Sub-Saharan Africa*, pp.179-192; or LEIDENMÜHLER, *Kollabierter Staat und Völkerrechtsordnung. Zur Aktualität der Westfälischen Ordnung, entwickelt an Fragen des Wegfalls effektiver Staatsgewalt*, pp.157-159.

significance to certain facts.¹⁷⁸ Once the legal status of statehood has thus been conferred on entities with an effective government, juridical statehood operates as a binary legal category, based on the presumption that effectiveness is maintained.

International law, it may be argued, both requires effective government, and presumes effective government. What happens when the principle of effectiveness is neglected in the creation of states – and the “juridical cart is now before the empirical horse”?¹⁷⁹ What if a government’s effectiveness subsequently declines, and its continued presumption turns into an untenable fiction? With juridical statehood built along the fault lines of law and fact, of legal and of factual capacity, these are questions of considerable complexity, but also significance. The balance between international law’s “concreteness” and “normativity” (Koskenniemi), the need to respond to changing realities while maintaining its counterfactual character, regularly tilts to the latter when it comes to the doctrine of statehood.¹⁸⁰ This becomes clear when we approach the factual phenomenon of fragile statehood from a legal perspective.

b) Approaching Fragile States from a Legal Perspective

i. Legal Scholarship and the Engagement with Failed and Fragile States

As noted at the outset, fragile states are a phenomenon located at the challenging interface between empirical and juridical statehood, and have therefore received little attention in international legal scholarship.¹⁸¹ Where legal scholars have engaged with fragile or rather ‘failed states’, the issue has triggered diverging and sometimes heated reactions.¹⁸² Three reactions can be distinguished, which I briefly outline in the

¹⁷⁸ Hiroshi Taki, Effectiveness, in RÜDIGER WOLFRUM (ed) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008), para. 5; HEIKE KRIEGER, *Das Effektivitätsprinzip im Völkerrecht* (Duncker & Humblot, 2000), 80-81.

¹⁷⁹ JACKSON, *Quasi-states. Sovereignty, International Relations and the Third World*, 23-24.

¹⁸⁰ E.g. MARTTI KOSKENNIEMI, 'The Politics of International Law', 1 *European Journal of International Law* (1990).

¹⁸¹ *Supra* note 9; and GIORGETTI, 'International Norms and Standards Applicable to Situations of State Fragility and Failure: An Overview', 264: “A rigorous analysis of the legal implications, significance, and consequences of state fragility is – despite its importance – missing.” A notable exception is the Berlin-based, multi-year research project that grapples with “governance in areas of limited statehood” from various disciplinary perspectives, including law. See *infra* note 242.

¹⁸² Though I emphasize the distinction between state fragility and state failure, with the latter concerning only the most extreme cases of governmental breakdown or collapse, in this section, I will employ both the terms ‘fragile state’ and ‘failed state’, to the extent I make reference to other legal studies wherein the terms failed, failing or fragile states are often used interchangeably.

following. First, some legal scholars seek to contribute to events on the political scene and the discourse among international relations scholars, rife with legal terminology, a positivist, doctrinal perspective. They occupy the middle grounds, if we consider the two ends of the spectrum. On the one end are those for whom state failure substantiates the claim that the traditional understanding of sovereign statehood is not only anachronistic, but also potentially harmful – and should be reconfigured to facilitate external intervention. On the other end of the spectrum are (critical) legal scholars, who relentlessly caution about the neo-colonialist and anti-pluralist undertones of the “failed state” notion and agenda, and demand that it should not be legitimized by international law, or lawyers.

To begin with, in terms of legal doctrine, state failure is typically translated as the breakdown of effective government. This translation goes back to Daniel Thürer, who was the first to define a failed state for the purposes of legal analysis as one that “though retaining legal, capacity has for all practical purposes lost the ability to exercise it.”¹⁸³ Thürer captures the discrepancy between juridical and empirical statehood by referring to the distinction between a state’s legal capacity (*Rechtsfähigkeit*) and its factual capacity to act (*Handlungsfähigkeit*).¹⁸⁴ Based on the principle of continuity, the failed state maintains its legal personality, and so the legal capacity to act.¹⁸⁵ International law thus acquiesces to the erosion of effective government in recognized states until it equals a mere fiction – an observation that accounts in part for the discipline’s limited concern with state failure. However, while legal capacity and capacity to act usually coincide, failed states often retain only the former, together with the legal status of statehood. Their capacity to act – to realize rights and obligations through their own action – is typically very limited.

Most legal studies on failed states endorse Thürer’s assertion that the legal status of the failed state continues and that it makes more sense for the purpose of legal analysis to think in terms of government effectiveness and capacity to act. For

¹⁸³ DANIEL THÜRER, 'The "Failed State" and International Law', 81 *International Review of the Red Cross*, 731 (1999), 734. Based on the original German version THÜRER, 'Der Wegfall effektiver Staatsgewalt: "The failed state"'.
¹⁸⁴ The capacity to act is the effective capacity of an international legal subject to dispose over the realization of rights and duties through its own behavior. GEIB, *Failed States. Die normative Erfassung gescheiterter Staaten*, 127. I return to this concept in *infra* chapter I.3 b).

¹⁸⁵ On the role of the principle of continuity for the maintenance of legal status where effectiveness of a government is in doubt, see KOSKENMÄKI, 'Legal Implications Resulting from State Failure in Light of the Case of Somalia', 6; GEIB, *Failed States. Die normative Erfassung gescheiterter Staaten*, pp. 107-111; the discussion in KREIJEN, *State Failure, Sovereignty and Effectiveness. Legal Lessons from the Decolonization of Sub-Saharan Africa*, at 363; and the references in *supra* note 172.

instance, Robin Geiß defines state failure as the collapse of effective government, which is indicated by the erosion of the monopoly on the legitimate use of force, in combination with a paralysis of the people's right to internal self-determination.¹⁸⁶ Similarly, Hinrich Schröder refers to states that formerly display all three elements of statehood, but where the breakdown of effective government leads to a situation where no government or other organ is in place, capable of representing the state in international relations.¹⁸⁷ In other words, the state's capacity to act is severely restrained internally, through the loss of the monopoly on the use of force, and externally, through the lack of organs that can act independently on the international plain and perform the state's rights and obligations under international law.

Are existing legal concepts thus sufficient to grasp, and – more importantly – to address the breakdown of government in international law? Or has the international community sought new approaches in dealing with failed states? Most authors confirm that the international community has no interest in the premature denial of statehood for reasons of legal certainty, and to guarantee the universal applicability of the international legal order – with regards to failed states, the international community's response has been marked by pragmatism, that is, upholding the legal fiction of effective government.¹⁸⁸

The fundamental shortcomings of such a fictitious assumption, however, are widely acknowledged in legal scholarship.¹⁸⁹ International law largely relies on states

¹⁸⁶ GEIß, *Failed States. Die normative Erfassung gescheiterter Staaten*, 91. Similarly: KOSKENMÄKI, 'Legal Implications Resulting from State Failure in Light of the Case of Somalia', 5-6; JÜRGEN BARTL, *Die humanitäre Intervention durch den Sicherheitsrat der Vereinten Nationen im "failed state". Das Beispiel Somalia* (Lang, 1999), 74; NEYIRE AKPINARLI, *The Fragility of the 'Failed State' Paradigm. A Different International Law Perception of the Absence of Effective Government* (Nijhoff, 2010), 11ff.; or LEIDENMÜHLER, *Kollabierter Staat und Völkerrechtsordnung. Zur Aktualität der Westfälischen Ordnung, entwickelt an Fragen des Wegfalls effektiver Staatsgewalt*, pp. 189-192. In contrast, Chiara Giorgetti defined state failure "as the incapacity of a state to perform its obligations towards its citizens and towards the international community in general. [...] State Failure can be seen as a *condition* in which the State is unable to provide political goods to its citizens and to the international community." GIORGETTI, *A Principled Approach to State Failure. International Community Actions in Emergency Situations*, 43.

¹⁸⁷ HINRICH SCHRÖDER, *Die völkerrechtliche Verantwortlichkeit im Zusammenhang mit failed und failing States* (Nomos, 2007), 64; also using Jellinek's definition as a basis: INGO LIEBACH, *Die unilaterale humanitäre Intervention im "zerfallenen Staat" ("failed state")* (Heymann, 2004).

¹⁸⁸ KOSKENMÄKI, 'Legal Implications Resulting from State Failure in Light of the Case of Somalia', 35, establishing that "[t]he absence of clear rules regulating state collapse was [...] interpreted to allow certain 'flexibility' from general rules"; and with a similar conclusion: GEIß, *Failed States. Die normative Erfassung gescheiterter Staaten*, 310-311.

¹⁸⁹ See, for instance, KREIJEN (ed) *State, Sovereignty, and International Governance*, 262 ff; BROOKS, 'Failed States, or the State as Failure?', 1162; GEIß, *Failed States. Die normative Erfassung gescheiterter Staaten*, 310; SCHRÖDER, *Die völkerrechtliche Verantwortlichkeit im Zusammenhang mit failed und failing States*, 74-78; AKPINARLI, *The Fragility of the 'Failed State' Paradigm. A Different*

to enforce international norms and judgments domestically.¹⁹⁰ It is for this reason that effective government is the central criterion of juridical statehood, and makes the conferral of legal status dependent on factual circumstances.¹⁹¹ The principle of effectiveness establishes a link between the “ought” and the “is”, between normative assumptions and empirical facts. If effectiveness is on the wane and the discrepancy between normative assumptions and empirical facts becomes too large, nothing less than the functioning and effectiveness of the international legal order are at stake. Its fundamental objectives – from the maintenance of peace and security to the realization of people’s self-determination – cannot be met if its constituting members lack the minimum level of capacities required to exercise rights and obligations under international law.¹⁹²

Next to international law’s effectiveness, the decline or breakdown of effective government affects the legitimacy of the international legal order, in so far as it still relies on state consent as its principal source. Without effective government, states cannot negotiate and enter into legal agreements, nor effectively participate in an increasingly dense network of international organizations and other fora of global policy-making and standard-setting, as Giorgetti highlights.¹⁹³

Ultimately, the rights of residents are left unprotected and they lack international representation if the government drops out as the central organ to uphold law and order domestically and to maintain international relations. Thürer and Herdegen therefore locate the failed states *problematic* at the intersection of state sovereignty

International Law Perception of the Absence of Effective Government, pp. 11-30; or GIORGETTI, *A Principled Approach to State Failure. International Community Actions in Emergency Situations*, 1-8.

¹⁹⁰ On the problem of international law’s enforcement in failed states in detail, see HENDRIX, ‘Law Without State: The Collapsed State Challenge to Traditional International Enforcement’; or CARSTEN STAHN, *The Law and Practice of International Territorial Administration. Versailles to Iraq and Beyond*, 1. publ. (Cambridge University Press, 2008), 31, referring to the (unfulfilled) function of the state as an “executive agent of international obligations”. Importantly, not just non-compliance, but also the partial, superficial, or “mimicry” implementation of international legal rules count as a challenge in this regard. See also OETER, ‘Regieren im 21. Jahrhundert: Staatlichkeit und internationales System’, 78-80; or LEIDENMÜHLER, *Kollabierter Staat und Völkerrechtsordnung. Zur Aktualität der Westfälischen Ordnung, entwickelt an Fragen des Wegfalls effektiver Staatsgewalt*, pp. 74-77 and 191.

¹⁹¹ *Supra* note 177.

¹⁹² As Brilmayer and Reisman put it in a nutshell: “[t]he frequently lamented failures of international law are, in fact, failures of states”. In GIORGETTI, *A Principled Approach to State Failure. International Community Actions in Emergency Situations*, Foreword, p. xv.

¹⁹³ *Ibid.*, chapter 1; also GEIB, *Failed States. Die normative Erfassung gescheiterter Staaten*, pp. 129-150. The consequences of state failure for the legitimacy of the international legal order, however, are rarely addressed in more detail in the relevant legal literature. Arguably, this is owed to the fact that problems of legitimacy arise only when we consider a broader range of (fragile) states as unable to effectively participate in international policy- and law-making, and focus not on rare incidents of state collapse.

and the principle of self-determination of peoples, since state institutions now longer exist to represent the rights and legitimate interests of the people.¹⁹⁴ With regards to Somalia, Koskenmäki concludes that the strict operation of international law and the acceptance of government as the only legitimate representative had overall contributed to the “marginalization of the Somali people”.¹⁹⁵

Considering that the lack of an effective government can pose such fundamental problems to the international legal order perhaps explains why another group of legal scholars look at state failure as a proof for the declining viability of sovereign statehood in its traditional, positivist conception, and take a more normative stance. On this end of the spectrum, few legal scholars actually propose to dismantle the formal trappings of juridical statehood altogether,¹⁹⁶ or to qualify the legal status of states based, for instance, on the democratic nature of control exercised by the government in power.¹⁹⁷ State sovereignty, however, is increasingly deconstructed and reconstructed not only in international relations scholarship,¹⁹⁸ but also in legal scholarship – in ways that first of all concern the sovereignty of states deemed to have ‘failed’ by various standards.

For instance, following a constitutionalist or cosmopolitan tradition of thought, state sovereignty has its source and objective in the protection of individual autonomy or human rights, and statehood should play no role in determining the boundaries of moral duties to other people.¹⁹⁹ Continuing this line of thought leads some legal

¹⁹⁴ THÜRER, 'Der Wegfall effektiver Staatsgewalt: "The failed state"', 17; MATTHIAS HERDEGEN, in *ibid.*, 49, 51. Other scholars similarly propose to reconfigure the mechanisms of popular representation at the international level in cases of state collapse. E.g. RICHARDSON, "Failed States", Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations', 75-76; or GORDON, 'Saving Failed States: Sometimes A Neocolonialist Notion', 174.

¹⁹⁵ KOSKENMÄKI, 'Legal Implications Resulting from State Failure in Light of the Case of Somalia', 35.

¹⁹⁶ E.g. BROOKS, 'Failed States, or the State as Failure?', 1180, proposing to look for “some other form of international ordering that neither relies on fictions of state sovereign equality nor seeks to wholly trump existing subnational power structures.”

¹⁹⁷ On the democratic entitlement debate, see *supra* note 165.

¹⁹⁸ Most prominently, STEPHEN D. KRASNER, *Sovereignty. Organized Hypocrisy* (Princeton University Press, 1999); and the contributions in STEPHEN D. KRASNER (ed) *Problematic Sovereignty. Contested Rules ad Political Possibilities* (Columbia University Press, 2001). See also ROBERT O. KEOHANE, 'Political Authority after Intervention: Gradations in Sovereignty', in J.L. Holzgrefe & Robert O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, 2003).

¹⁹⁹ E.g. ANNE PETERS, 'Humanity as the A and Ω of Sovereignty', 20 *The European Journal of International Law*, 513 (2009), constructing state sovereignty as flowing from “humanity”, thus dissolving the conflict between sovereignty and human rights, and claiming the primacy for human rights. See also MICHAEL REISMAN, 'Sovereignty and Human Rights in Contemporary International Law', 84 *American Journal of International Law*, 866 (1990); or CHRISTIAN TOMUSCHAT, *International Law: Ensuring the Survival of Mankind on the Eve of a new Century. General Course on Public International Law (Volume 281)* (Brill, 2001).

scholars to propose the grading of sovereignty in accordance with the “measure of care by government for its citizens”,²⁰⁰ or more generally, the qualification of sovereignty on the basis of a government’s internal legitimacy or performance.²⁰¹

Certainly, the line between *lex lata* and *de lege ferenda*, between positivist and normative arguments, is increasingly difficult to draw in this context. To some extent, state practice already supports the qualification of sovereignty where a state commits mass atrocities or large-scale violations of human rights, and yet the idea to cast state sovereignty as a “responsibility to protect” that may be forfeited remains controversial.²⁰² In the evolving discourse on the limits of sovereignty, however, it is safe to say that failed states are routinely quoted as examples where various kinds of external interventions in domestic affairs can, or should be justified.²⁰³

²⁰⁰ HELEN M. STACY, 'Relational Sovereignty', 99 *American Society of International Law (ASIL) Proceedings*, 396 (2005), 399; MICHAEL P. SCHARF, 'Earned Sovereignty. Juridicial Underpinnings', 31 *Denver Journal of International Law and Policy*, 373 (2002-2003), 374; HENRY G. SCHERMERS, 'Different Aspects of Sovereignty', in Gerard Kreijen (ed) *State, Sovereignty, and International Governance* (Oxford University Press, 2002); or YANNIS, 'The Concept of Suspended Sovereignty in International Law and its Implications in International Politics'. In contrast, Cohen argues that sovereign statehood can be reconciled with the rise of constitutionalist and cosmopolitan elements of order: JEAN L. COHEN, 'Whose Sovereignty? Empire Versus International Law', 18 *Ethics & International Affairs*, 1 (2004), 13.

²⁰¹ E.g. ANNE-MARIE SLAUGHTER, 'International Law in a World of Liberal States', 6 *European Journal of International Law*, 503 (1995), 536ff; ALLEN E. BUCHANAN, *Justice, Legitimacy, and Self-determination. Moral Foundations for International Law* (Oxford University Press, 2003), 56-57; or with a more moderate argument, PETERS, 'Humanity as the A and Ω of Sovereignty', 519-521.

²⁰² According to the concept of responsibility to protect, sovereignty is reconfigured as the primary responsibility of the state to protect its population. If a state, due to a lack of capacity and/or will, does not meet its primary responsibility, it passes to the international community. See INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (ICISS), International Development Research Centre, *'Responsibility to Protect'* (2001), endorsed by the UN General Assembly in the 2005 World Summit Outcome, UN Doc. A/60/L.1 (15.09.2005), para. 138. On the legal nature of the responsibility to protect, see also CARSTEN STAHN, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', 101 *The American Journal of International Law*, 99 (2007); and tracing the evolving state practice on humanitarian intervention and the responsibility to protect from a critical perspective, ANNE ORFORD, 'Moral Internationalism and the Responsibility to Protect', 24 *European Journal of International Law*, 83 (2013), 98-103.

²⁰³ For instance, the ICISS Report (*supra* note 202) that first sets out the concept and explicitly refers to situations of state failure as circumstances justifying intervention (para. 4.19), and to fragile states as a security threat throughout (e.g. para. 1.35). See also AMY ECKERT, 'United Nations Peacekeeping in Collapsed States', 5 *Journal of International Law and Practice*, 273 (1996), arguing that the UN should consider peacekeeping operations without consent in countries that lack a functioning government; NOEMI GAL-OR, 'Suspending Sovereignty: Reassessing the Interlocking of Occupation, Failed and Fragile State, Responsibility to Protect, and International Trusteeship (Lessons from Lebanon)', 41 *Israel Law Review*, 302 (2008); or GIORGETTI, *A Principled Approach to State Failure. International Community Actions in Emergency Situations*, 185-188. Marauhn makes an interesting proposal that is *prima facie* less interventionist, namely, “political intervention by peaceful means in order to promote good governance”, “in so far as individuals may suffer from the breakdown of governmental structures in fragile states”. THILO MARAUHN, 'The Promotion of Good Governance in Fragile States', in Kerstin Kötschau & Thilo Marauhn (eds), *Good Governance and Developing Countries* (Peter Lang, 2007), 53.

The impression that the failed state label is (mis)used to justify infringements on the sovereignty of states deemed ineffective or illegitimate in turn explains why critical legal scholars – on the other end of the spectrum – follow the discourse with so much suspicion. Among the very first legal articles on state failure are those of Ruth Gordon and Henry Richardson, pointing to the “colonialist nostalgia” that underlies attempts to conceptualize and address weak or imploding statehood in the global South.²⁰⁴ It is often post-colonial and critical legal scholars that retrace the historical precedents and continuities of hierarchies between states, or even argue that factual hierarchies are entrenched by the legal doctrines of statehood and sovereign equality.²⁰⁵

Their self-conscious, critical perspective offers important insights for the study of fragile states. Not only does it expose the particularistic social construction that often informs legal arguments regarding the sovereignty of the ‘failed’ state. It also profoundly challenges the assertion that fragile states are a new phenomenon, or an exception from the norm.²⁰⁶ Critical legal scholars continually caution that any attempt at grading sovereign statehood today on the basis of the state’s capacity or will to fulfill certain functions would have to be considered in light of these continuities.²⁰⁷ Moreover, a critical perspective turns the juridical discourse on failed and fragile states upside down: rather than inquiring how they challenge the effectiveness of the legal order, attention turns to the question how existing legal rules

²⁰⁴ RUTH GORDON, 'Some Legal Problems with Trusteeship', 28 *Cornell International Law Journal*, 301 (1995) and RICHARDSON, "'Failed States', Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations'.

²⁰⁵ Two prominent representatives are Antony Anghie, who retraces the colonial origins of international law and discloses how the civilizing mission of European states, the assertion of a dichotomy between civilized and uncivilized states, has profoundly shaped the international legal order; and Gerry J. Simpson, who finds that powerful states have repeatedly managed to transform their prerogatives into legal forms by establishing “legalised hierarchies” that persist behind the principle of sovereign equality. *Supra* note 41.

²⁰⁶ For an overview of the historical evolution of juridical statehood, see, for instance, CRAVEN, 'States and Recognition in International Law', 217 ff., or from an explicitly postcolonial perspective, PAHUJA, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality*, chapter 3.

²⁰⁷ In the past, the conferral of statehood rested on subjective criteria and decision-making, and empirical differences between states were translated into different legal status under international law, e.g. that of colonies, protectorates, mandate territories, or dominions. See, for instance, LASSA OPPENHEIM, *International Law. Vol. 1 Peace*, 8th (Longmans, 1955), § 65: “Yet there are States in existence which certainly do not possess full sovereignty, and are therefore named not-full sovereign States. All States which are under the suzerainty or under the protectorate of another State, [...] belong to this Group [...]. Such imperfect International Personality is, to some extent, an anomaly; but the very existence of States without full sovereignty is an anomaly in itself.”

may be complicit in creating and perpetuating state fragility through disadvantaging particularly weak states.²⁰⁸

In sum, it seems that legal scholarship's engagement with failed or fragile states is informed by the same two narratives that underlie the relevant discourse in other disciplines. Depending on whether state failure is acknowledged as an empirical phenomenon, or primarily exposed and criticized as a social construction, it has or has not been found worthy of doctrinal reconstruction. If so, legal scholars mostly concentrate on extreme (and extremely rare) instances of complete state failure or irrevocable state collapse, and the implications for international security.²⁰⁹ In contrast, the broader spectrum and much more common phenomenon of state fragility is usually considered irrelevant for international law.²¹⁰ What are the correlates of state fragility in legal doctrine?

ii. Shortcomings of a Juridical Translation

As a variable condition, state fragility is not amenable to a clear-cut legal definition. In fact, even from a purely empirical perspective, we have seen that it is difficult to pin down what precisely fragile states are, let alone to disentangle the constructed notion from its paternalistic undertones and normative baggage.

Considering how international legal scholars have sought to describe state failure in terms of legal doctrine might nonetheless provide some clues as to how we can understand state fragility, a weaker form or preliminary stage of state failure. If legal

²⁰⁸ For instance, legal rules may pose requirements on fragile states that pose further strains on the already limited capacity and resources of fragile states. See KINGSBURY & DAVIS, '*Obligation Overload: Adjusting the Obligations of Fragile or Failed States*'; STEFAN OETER, 'Prekäre Staatlichkeit und die Grenzen internationaler Verrechtlichung', in Regina Kreide & Andreas Niederberger (eds), *Transnationale Verrechtlichung. Nationale Demokratien im Kontext globaler Politik* (Campus, 2008); and more generally, CHRISTINA BINDER, 'Stability and Change in Times of Fragmentation: The Limits of Pacta Sunt Servanda Revisited', 25 *Leiden Journal of International Law*, 909 (2012), arguing that both the law of treaties and the law of state responsibility leave little room for states to escape or postpone international treaty obligations on the grounds that they lack the necessary capacities to comply.

²⁰⁹ The vast majority of legal studies concerned with failed states show a remarkable concern with the question how security threats emanating from their territories can be prevented or mitigated within the framework of international law, including through forcible intervention. See only GEIB, *Failed States. Die normative Erfassung gescheiterter Staaten*, 121-127; GIORGETTI, *A Principled Approach to State Failure. International Community Actions in Emergency Situations*, chapter 7; MARIO SILVA, 'Somalia: State Failure, Piracy, and the Challenge to International Law', 50 *Virginia Journal of International Law Association*, 553 (2010); LEIDENMÜHLER, *Kollabierter Staat und Völkerrechtsordnung. Zur Aktualität der Westfälischen Ordnung, entwickelt an Fragen des Wegfalls effektiver Staatsgewalt*, 443-505; and the references in *supra* note 203.

²¹⁰ E.g. GEIB, *Failed States. Die normative Erfassung gescheiterter Staaten*, 57.

scholars describe state failure as the complete breakdown of effective government, state fragility amounts to its partial impairment.²¹¹ Accordingly, fragile state are states that retain legal capacity, while their capacity to act is not lost, but severely restricted.²¹² Aptly explained by Thürer and others, the capacity to act pertains to the government, so that both state failure and state fragility are phenomena that concern only the effectiveness and capacity to act of a country's government, but not the legal status of state.²¹³

Looking a bit closer, however, the attempt to translate state fragility in terms of legal doctrine only reveals the shortcomings of existing concepts and tools when approaching the empirical phenomenon on a general basis, and shows that legal consequences can at best be determined on a case-by-case basis.

Already the doctrinal focus on “government” is of limited value, insofar as it narrowly refers to the administrative body in control of the state at a given time. In contrast, the condition of state fragility often outlasts the term of a government, and affects not just its executive functions.²¹⁴ Is it adequate to speak of a government's limited effectiveness, if state fragility regularly “affects the basic and entire structure of the State”?²¹⁵ Besides, if a government loses effective control over parts of the territory, we have seen that the result is usually not the emergence of a power vacuum or ungoverned space, as the notion of governmental breakdown may suggest.²¹⁶

²¹¹ The legal definition of state failure as the “breakdown” of effective government is not appropriate to describe state fragility, since breakdown connotes a sudden incidence and total collapse of government. In turn, the notion of a “crises of government” proposed by Anne Peters still connotes a temporary confined period of ineffectiveness, and thus excludes countries where ineffectiveness is not an exception but the norm. PETERS, 'Statehood after 1989: 'Effectivités' between Legality and Virtuality', 174.

²¹² Also MARAUHN, 'The Promotion of Good Governance in Fragile States', 50.

²¹³ *Supra* notes 183 and 184. Some international lawyers have used the notion of “ineffective government” as antonym to the legal concept of effective government. As such, it refers not to a limitation of effective government, but rather to its negation. E.g. KREIJEN, *State Failure, Sovereignty and Effectiveness. Legal Lessons from the Decolonization of Sub-Saharan Africa*, 334.

²¹⁴ In its broadest sense, “government” can encompass not just the executive organs, but all state organs (legislative, judicial and executive), at all levels (central state, regional, or local). In an international law context, however, government often refers to the executive organs of the state only, i.e. the Head of State and the cabinet. MAGIERA, 'Governments', paras. 2-4.

²¹⁵ GIORGETTI, *A Principled Approach to State Failure. International Community Actions in Emergency Situations*, 6.

²¹⁶ *Supra* note 135. See also ROBIN GEIB, 'Armed Violence in Fragile States. Low-intensity Conflicts, Spillover Conflicts, and sporadic Law Enforcement Operations by Third Parties', 91 *International Review of the Red Cross*, 127 (2009), 129-131, in which the author of an earlier monograph on ‘failed states’ circumscribes fragile statehood.

Rather, there is a growing understanding that non-state actors claim effective control where the government retreats.²¹⁷

Further, even if it is appropriate to characterize fragile states with regards to their governments' limited effectiveness, we cannot make much of such a broad circumscription. In principle, effectiveness may well be variable, i.e. a "matter of degree".²¹⁸ The principle of effectiveness, however, is used in the concept of 'effective government' as a criterion to determine a binary legal status, and not in a broad sense, to encompass all instances where a factual situation may affect legal norms.²¹⁹ Accordingly, once an entity has gained the legal status of state based on the presumption that it has a sufficiently effective government, a subsequent decrease of effectiveness has no automatic legal consequences.

In turn, the concept of 'capacity to act', imported from domestic law, is useful for keeping apart a state's legal capacity to be a bearer of rights and duties under international law, and the capacity required to actively perform legal acts and produce legal effects.²²⁰ Like effectiveness, the capacity to act can also be a matter of degree.²²¹ It is important to note, however, that the significance of the concept is a rather different one in international law than in domestic law. Domestic law regularly defines different categories of capacity for natural and artificial persons, and accordingly qualifies their ability to produce legal effects, e.g. to conclude treaties.²²² In international law, the principle of sovereign equality forbids such legal qualifications based, for instance, on categories of maturity, physical or mental health.²²³ Instead, the capacity to act refers to a government's ability to exercise

²¹⁷ Depending on the effectiveness of their claim, some of these non-state actors can have a proper status under international law, for instance, constituting a party to a conflict in the sense of Art. 3 of the 4th Geneva Convention. See SCHRÖDER, *Die völkerrechtliche Verantwortlichkeit im Zusammenhang mit failed und failing States*, 57-58.

²¹⁸ PETERS, 'Statehood after 1989: 'Effectivités' between Legality and Virtuality', 174.

²¹⁹ HIROSHI TAKI, 'Effectiveness', in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (Oxford University Press, February 2013), paras. 3 and 4.

²²⁰ On this, see the detailed discussion of the difference between a state's formal and actual independence in CRAWFORD, *The Creation of States in International Law* 62-89.

²²¹ AKPINARLI, *The Fragility of the 'Failed State' Paradigm. A Different International Law Perception of the Absence of Effective Government*, 106, elaborating that whereas the legal capacity automatically attaches to the legal status of statehood, the capacity to act can depend on (and vary with) the individual subject of international law.

²²² In domestic legal orders, different categories of capacity to act exist for natural persons, for instance for minors or individuals with a certain physical condition. While they have legal capacity, their capacity to act is circumscribed by national law, with the underlying ratio being that the state seeks to protect more vulnerable members of society.

²²³ The principle of sovereign equality also forbids an arrangement whereby one state or group of states would have to assume the role of a legal guardian for another state and thus defy its legal independence.

effective control over a territory and people, and its ability to perform certain rights and obligations.²²⁴ To what extent a government exerts control and has the capacity to act can thus be relevant in determining the state's responsibility under international law, but this is only done on a case-by-case basis.²²⁵

Finally, fragile states are often described as states that lack the ability or political will to perform certain functions vis-à-vis their citizens.²²⁶ International law knows a similar formulation: states may be found “unable or unwilling”. “Unable or unwilling” is a standard that appears in a number of legal regimes, and is typically used to decide questions of complementarity in multi-level systems of governance. If a state is found unable or unwilling to perform an obligation, the responsibility basically passes to the next level. Apart from the emerging concept of the responsibility to protect,²²⁷ the standard is applied, for instance, in the complementarity regime of the International Criminal Court;²²⁸ the regime for the protection of Internally Displaced Persons;²²⁹ and to determine the lawful scope of extra-territorial self-defense vis-à-vis non-state actors.²³⁰ At what point a state is found “unable or unwilling” is generally ill-defined,

Some international lawyers have nevertheless proposed different kinds of trusteeship arrangements to deal with the absence or ineffectiveness of governments in failed or fragile states. See, for instance, GIORGETTI, *A Principled Approach to State Failure. International Community Actions in Emergency Situations*, 184-188 (and pp. 9-17 on how the “international community has acted on behalf of states in the past”); and with a critical assessment of proposals to bring back trusteeship, GORDON, ‘Some Legal Problems with Trusteeship’.

²²⁴ On the link between the (internal and external) effectiveness of a government and its capacity to act under international law, see also GEIB, *Failed States. Die normative Erfassung gescheiterter Staaten*, 128, and SCHRÖDER, *Die völkerrechtliche Verantwortlichkeit im Zusammenhang mit failed und failing States*, 62-63.

²²⁵ In detail, SCHRÖDER, *Die völkerrechtliche Verantwortlichkeit im Zusammenhang mit failed und failing States*, pp. 84-107. Where state organs still exist and the capacity to act is only limited, not void, whether or not the organs of the state can be held responsible for a violation of international law – including for acts committed by non-state actors operating from its territory – can only be determined on a case-by-case basis. The concept of capacity to act does not establish general categories or thresholds in this regard.

²²⁶ See, for instance, the definitions of the OECD quoted in *supra* note 1 and 144.

²²⁷ See INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (ICISS), ‘*Responsibility to Protect*’, para. 2.30, and in general, *supra* note 202. There are no clearly defined criteria or thresholds, however, to determine when a country lacks the capacity or will to assume its responsibility to protect. On this point, see CARLO FOCARELLI, ‘The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine’, 13 *Journal of Conflict & Security Law* 191 (2008), 211.

²²⁸ See Article 17 of the Rome Statute of the International Criminal Court, 17.7.1998, 2187 UNTS 3. The meaning of “unable” and “unwilling” is probably most elaborated in this context. See, for example, JANN K. KLEFFNER, *Complementarity in the Rome Statute and National Criminal Jurisdiction* (Oxford University Press, 2007), chapter IV.

²²⁹ See Principles 3 and 25 of the Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2 of 17.4.1998 and the comment of WALTER KÄLIN, ‘Guiding Principles on Internal Displacement. Annotations’, 32 *ASIL Studies in Transnational Legal Policy*, 1 (2000), 1.

²³⁰ In this context, Ashley Deeks is among the few legal scholars that analyze what the “unable or unwilling” test actually implies from substantive and procedural perspective: ASHLEY S. DEEKS,

and in any case varies from one legal regime to another, depending on the state's respective obligations. Consequently, the government of a fragile states may in certain circumstances be found "unable or unwilling" to exercise certain duties under international law, but this does not make the state less sovereign, or less of a state.

The shortcomings of a juridical translation of state fragility are thus obvious. Its legal consequences will always depend on the case: on the particular symptoms of fragility, the general circumstances of a country, as well as the degree and kind of rights and duties the state has assumed but cannot realize. International law may increasingly circumscribe the structure and functions of states, but a violation of the respective obligations does not affect the state's legal status.²³¹ To argue otherwise would mean to conflate *how* governmental authority is exercised with the exercise of governmental authority as a criterion for statehood. Moreover, the principle of sovereign equality aims precisely at preventing effectiveness deficits or different levels of factual capacity from being translated into law. Outside of the specific case, the difficulty of defining and determining the legal consequences of state fragility thus constitutes not a regrettable constraint, but a deliberate restraint of an international legal order based on sovereign equality.

4. Conclusion

In this chapter, I approached fragile states as a phenomenon characterized by the discrepancy between empirical statehood and juridical statehood. Fragile states often lack the institutional and administrative capacities required to exercise rights and obligations under international law, while they are bestowed with the legal status of states and the formal trappings of sovereignty. An empirical-sociological perspective can well account for variations in state effectiveness. The causes and consequences of state fragility have attracted much research, although the notion of fragile states

"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense', 52 *Virginia Journal of International Law*, 483 (2012). Deeks notes that "strikingly little attention has been paid to the nature and consequences of – or solutions to – the imprecision surrounding the "unwilling or unable" test." (488). To determine whether a government is "unable", for instance, Deeks suggests assessing its level of territorial control and the capacity of its military and police forces (525-529). See also DAWOOD I. AHMED, 'Defending Weak States Against the "Unwilling or Unable" Doctrine of Self-Defense', 9 *Journal of International Law and International Relations*, 1 (2013), 12-20.

²³¹ E.g. GIORGETTI, 'International Norms and Standards Applicable to Situations of State Fragility and Failure: An Overview', 265, arguing that international law does not only define the state and sanction its existence, but "[a]t the urging of multilateral organizations and bilateral aid agencies, transnational benchmarks and prescriptions are applied to such diverse activities as framing constitutions; holding elections; establishing legislatures and courts [...]."

remains a highly ambiguous and politically charged notion. From a legal perspective, variations in state effectiveness, the factual inequalities between states, or attempts at qualifying statehood accordingly, retreat behind the doctrine of juridical statehood and the fundamental principle of sovereign equality. The static conception of juridical statehood also explains why international legal scholars have mostly followed the evolving discourse on state fragility with considerable reservation, if not outright criticism. Not surprisingly, the attempt to provide a juridical translation of state fragility as a phenomenon that connotes effectiveness deficits that fall short of a complete breakdown of government proved to be of limited value.

As suggested at the outset, however, the important distinction between empirical and juridical statehood should not obstruct our view at the twilight existence of fragile states. However doubtful the value of a uniform designation as ‘fragile’, states do exist whose governments struggle to exercise effective control over their territory and people, while they are caught in cycles of extreme poverty and repeated conflict. Weak statehood undoubtedly threatens human development and human security, and can pose challenges to the international system that require an urgent and concerted response. To paraphrase James Crawford, the language of state failure has perhaps created a lot of confusion – but its principal value still consists in pointing to an urgent, “real debate about development and governance”.²³²

At the same time, we have seen that the existence of states with extremely weak capacities puts into question international law’s fundamental assumptions – namely, the assumption of effective government, and the almost exclusive focus on the formal institutions of the state.²³³ And while state fragility is not a new phenomenon, its relevancy from the perspective of international law is still growing, considering the increasing reach and depth of international regulation, as well as the diversification of actors and instruments of regulation. States that have a limited capacity to act will struggle with ever more demanding international obligations to provide numerous goods and services, and with maintaining the infrastructure

²³² CRAWFORD, *The Creation of States in International Law*, 723: “To this real debate about development and governance the language of state failure has added little but confusion.” Crawford adds: “what is needed is not a more intrusive intervention *doctrine*, but more effective ‘*measures*’”. He seems to imply that such measures would consist of operational activities aimed at strengthening domestic capacities and governance.

²³³ See *supra* chapter I.3 b) (i).

necessary to fulfill these tasks.²³⁴ On the one hand, the fictitious assumption of effective government has thus more far-reaching consequences in an international legal order that has long moved from a law of coordination to a law of cooperation. On the other hand, it becomes easier for a state to be regarded as fragile, if statehood itself is increasingly cast as requiring not just the maintenance of a minimum level of law and order, but also the fulfillment of an array of requirements in other realms – from the combat of transnational crime to environmental protection. Neither the analytical shortcomings of the broad-brush notion of fragile states, nor the dubious premises of the evolving fragile states agenda, can thus conceal the fundamental challenge that the discrepancy between empirical and juridical statehood can pose to the international legal order – and to the actors operating on its premises and within its confines.

Fragile states matter to international law – and a legal grasp on the empirical phenomenon that acknowledges the internal contradictions and biases of the notion is relevant and due. For international legal scholarship it means looking not just at the emergence or breakdown of effective government, but also at its evolution. The current restraint may constitute a tribute to the formality and “wonderful artificiality” of juridical statehood. Yet it risks lagging behind a reality that has long responded to a widespread lack of basic capacity on the part of national governments. Therefore, I propose to shift the focus away from the question what state fragility is, to the question how it is perceived and responded to, in order to learn more about its practical meaning, as well as its significance from the perspective of international law.²³⁵ A look at the evolving understanding of fragile states has shown that they have become a key priority and attracted a lot of attention particularly in the fields of international security and development cooperation. In this context, international organizations emerge as important actors in furthering a concerted approach to fragile states. As I illustrate in the subsequent chapters, international organizations increasingly engage in regulatory activities concerning fragile states, adopting rules

²³⁴ GIORGETTI, *A Principled Approach to State Failure. International Community Actions in Emergency Situations*, 1-4. If the array of formal and informal requirements imposed on them creates a burden that exceeds their limited capacities, they may actually suffer from what Benedict Kingsbury and Kevin have termed an “obligation overload”. KINGSBURY & DAVIS, ‘*Obligation Overload: Adjusting the Obligations of Fragile or Failed States*’. In this context, the World Bank has used a very graphic comparison to illustrate that international obligations on states are becoming more demanding: whereas the 1948 UN Convention Against Genocide consisted of 17 operative paragraphs, the 2003 Convention Against Corruption has 455.

²³⁵ Jochen Frowein proposes a similar approach in his study of *de facto* regimes. *Supra* note 46.

that do not necessarily conform to the traditional sources of international law – and yet they do require the attention of international law scholars. Ultimately, considering the actual position that fragile states are thus accorded by different actors, through different legal instruments, could yield more shades of gray than the formalistic conception of juridical statehood suggests.²³⁶

²³⁶ On this point, see also Weiler (*supra* note 18).

II. Development Cooperation with Fragile States – Challenge and Response

One may endorse the notion of “fragile state” as a label for the development challenges of weak-capacity states, or reject it as too broad a category to be of any analytical value. One may endorse the notion for drawing attention to the familiar shortcomings of a state-based international system and its ontology, or reject it as too politicized and hegemonic a vocabulary to be used objectively. Either way, with its constant reiteration, quantification, and operationalizing, the notion of fragile states has become a basis for action in the field of development cooperation.²³⁷

For development cooperation, the existence of states with very weak capacities for economic and social development constitutes its principal *raison d’être*. To some extent, the very emergence of an international development regime stems from the recognition that sovereign states may be autonomous in law, but are often weak and materially dependent on other states in reality. Though development cooperation is certainly not solely grounded in humanitarianism, its declared objective today consists in promoting the long-term economic, social and political development of poorer countries by providing them with financial and technical assistance. It is thus fundamentally concerned with strengthening the factual capacity and effectiveness of governments.²³⁸ In this sense, development cooperation could be seen to assume a crucial, auxiliary function for international law: it helps to strengthen or maintain the ‘effective government’ on which the international legal order is premised.²³⁹

²³⁷ For a compelling argument of how even as a social construct, the classification of “fragile states” can impact on reality, see NEWMAN, 'Failed States and International Order: Constructing a Post-Westphalian World'; and BHUTA, 'Governmentalizing Sovereignty: Indexes of State Fragility and the Calculability of Political Order', 135.

²³⁸ E.g. JACKSON, *Quasi-states. Sovereignty, International Relations and the Third World*, p. 5 and 48, arguing that many developing countries are “consisting not of self-standing structures with domestic foundations – like separate buildings – but of territorial jurisdictions supported from above by international law and material aid – a kind of international safety net.” Jackson also points to a mutual dependency between quasi states and international development actors when he argues that the development “enterprise arguably would be unnecessary if there were no quasi-states”. See also CLAPHAM, *Africa and the International System. The Politics of State Survival*; and KAL RAUSTIALA, 'Rethinking the Sovereignty Debate in International Economic Law', 6 *Journal of International Economic Law*, 841 (2003), arguing that international economic institutions help reasserting the sovereignty of developing countries, which is compromised by processes of globalization.

²³⁹ In contrast, Pahuja points out that “development works to circumscribe the political promise of international law”. PAHUJA, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality*, 77. From the perspective of third world approaches, development cooperation is often criticized for sustaining developing countries in their dependency of industrialized countries. It

If there is already an intrinsic link between the regime of development cooperation and the broader challenge of weak statehood, in recent years, conflict-affected and fragile states have emerged as a key priority in development discourse and practice. The combination of weak capacity and governance, insecurity and political instability render some countries a particularly challenging environment for development cooperation – and one where its state-centric paradigm and traditional business models have often proven inadequate or ineffective. An enormous amount of research and resources have consequently gone into finding a response to the challenge of aiding fragile states, which we will see later has resulted in a proliferation of reports, indices, policy recommendations and guidelines.²⁴⁰

International organizations have been a driving force in these developments. Against the background of a comparatively poor track record in conflict-affected, instable and politically charged environments from the West Bank and Gaza to Afghanistan, virtually all international organizations engaged in operative development cooperation have sought to identify and address the specific constraints they are facing in these settings. Many organizations have begun to engage more strategically in state-building, and to adapt the processes and aid instruments whereby they engage with a country and provide assistance. Others have contributed to the evolving understanding of state fragility through their own research, or supported the development of international principles and guidelines for dealing with fragile states.

Ultimately, it is the standard-setting activities, strategic and operational reforms, and evolving organizational practice of international development organizations that is essentially changing the design, management, and delivery of ODA vis-à-vis fragile states.²⁴¹ Moreover, it is through their actions that policy shifts in multilateral development cooperation have a direct bearing on the states concerned and their respective population. Since fragile states are typically very dependent on aid as ODA constitutes the single largest resource flow received, whether and how international development organizations engage with these countries can have considerable material, as well as political consequences.

In this chapter, I further develop these arguments. I begin by stating how the notion of fragile state, through its constant reiteration, quantification, and

would thus discourage political debate about structural inequality and divert attention from urgent, fundamental reforms to the international system.

²⁴⁰ *Infra* chapter II.1 and II.3.

²⁴¹ On the definition of ODA, see *supra* note 51.

operationalizing in the regime of development cooperation, has become a basis for action (II.1). Next, I lay out the challenges that international development organizations often face when seeking to engage with fragile states on the basis of a traditionally state-centric development paradigm (II.2). To illustrate how different organizations have responded to these challenges, I provide an overview both of general policy-making and standard-setting activities in the context of the OECD Development Assistance Committee (DAC), and of some of the strategic shifts and operational reforms undertaken by organizations engaged in operational development cooperation (II.3). In conclusion, I point out that not only development objectives, processes, and instruments are adapted for fragile states, but also the rules that inform them (II.4).

1. From Discourse to Action

Looking at the evolving engagement of scholars and practitioners with fragile states, we have seen how the notion has constantly been reiterated and refined as a catchphrase for the international community's growing concern with weak state institutions. Attention and resources devoted to research on the causes, characteristics, and consequences of weak statehood have increased steadily over the last two decades. Policy-oriented research conducted by universities or think tanks in the United States and Europe has been supported through public sources of funding.²⁴² Governments have engaged in policy analysis, often with a focus on the security implications of state fragility.²⁴³ International organizations like the World Bank and the OECD have commissioned research and produced their own reports, contextual analysis and case studies.²⁴⁴

²⁴² For instance, the US-based Brookings Institute issues the "Index of State Weakness in the Developing World" (Susan E. Rice and Stewart Patrick, *Index of State Weakness in the Developing World*, The Brookings Institution, Washington DC, 2008). In Europe, the London School of Economics has established a "Crisis State Research Network" (<http://www.lse.ac.uk/internationalDevelopment/research/crisisStates/Home.aspx>, accessed December 2014); and in Germany, the Free University of Berlin hosts a collaborative research center on "Governance in Areas of Limited Statehood" (<http://www.sfb-governance.de>, accessed December 2014).

²⁴³ For instance, a "The State Failure Task Force" (later renamed in "Political Instability Task Force") based at the University of Maryland was commissioned by the US Central Intelligence Agency in 1994 to study the correlates of state failure.

²⁴⁴ For an overview, see NAY, 'International Organisations and the Production of Hegemonic Knowledge: How the World Bank and the OECD helped invent the Fragile State Concept'; and including other organizations, *infra* chapter II.3 a) and b).

Research on fragile states – despite the various interests and needs of different actors that commission or produce it – is typically driven by a search for similarities between diverse countries, and the corresponding objective of generating uniform solutions. In the words of Nehal Bhuta, the supposition of a “unified object” of study, and with it the idea that “qualities of highly heterogeneous political and social orders can be mapped, grasped, known, compared and addressed” are thus continuously reinforced.²⁴⁵ Arguably, such discursive processes contribute to the ‘normalization’ (in the sense of Foucault) of a certain idea of statehood, and state fragility as a deviation thereof.²⁴⁶ Seen through the lens of constructivist theories of international relations, they contribute to the formation of identities and interests with an important impact on how fragile states are perceived and addressed by the international community.²⁴⁷ The understanding that a group of fragile states shares some distinct characteristics or at least needs, warranting a specific, urgent, and concerted response, is thus increasingly entrenched.

This trend has been reinforced by numerous efforts to measure state fragility, which facilitate the move from discourse to action. Various research institutions, but also governments and international organizations, produce different indices, classifications, and rankings, both for analytical and practical purposes.²⁴⁸ The quantification of state fragility becomes a means of proving the objectivity and viability of the concept, and thus a basis for its operationalization.²⁴⁹

Most indices capture the progressive character of fragility by ranking countries on the basis of a metric scale, with an ideal notion of effective or resilient statehood positioned at the top end of the spectrum. Statehood is usually disaggregated in certain core dimensions – e.g. politics, security, economy, and social welfare – and a state’s performance is measured for each dimension using a compilation of different indicators, such as the World Bank Governance Indicators (WGI), Gross Domestic

²⁴⁵ BHUTA, 'Governmentalizing Sovereignty: Indexes of State Fragility and the Calculability of Political Order', 134 and 136.

²⁴⁶ Ibid., 137 and 139, drawing on Foucault’s ‘dispositif’ of security as elaborated in his 1977-88 Lectures on Security, Territory, Population.

²⁴⁷ NEWMAN, 'Failed States and International Order: Constructing a Post-Westphalian World', 439.

²⁴⁸ Examples include the “State Fragility Index” compiled at the George Mason University; the Brookings “Index of State Weakness” (*supra* note 242), and the “Failed State Index”, issued jointly by the Fund for Peace and Foreign Policy magazine. For an overview, see JAVIER FABRA MATA & SEBASTIAN ZIAJA, United Nations Development Programme (UNDP) and German Development Institute, 'Users' Guide on Measuring Fragility' (2009), 24, and BETHKE, 'Zuverlässig invalide – Indizes zur Messung fragiler Staatlichkeit'.

²⁴⁹ BHUTA, 'Governmentalizing Sovereignty: Indexes of State Fragility and the Calculability of Political Order', 143.

Product (GDP), and Human Development Index (HDI).²⁵⁰ For example, the “State Fragility Index” measures two essential qualities of state performance, effectiveness and legitimacy, and these quality indices combine scores of measurements along the dimensions of security, governance, economics, and social development.²⁵¹ Again, despite the different composition of indicators and the acknowledgement that the origins of fragility are manifold, the project of measuring state fragility is necessarily informed by the assumption that not every case is unique. Accordingly, the resulting country rankings show considerable overlap: typically, they are headed by Somalia, followed in diverging order by Sudan, the Democratic Republic of Congo (DRC), Chad, and Afghanistan.

Scholars across disciplines have pointed out that indicators and rankings can play a potentially powerful role in constituting and shaping perceptions, and have sometimes important material consequences.²⁵² Indicators measuring state fragility contribute to elaborating and entrenching the social construction of the fragile state. In the words of Robert Jackson, they form part of a “global statistical enterprise organized to measure and report on the comparative performance of countries”.²⁵³ The material consequences of indicator-based classifications become evident where they are put to use, for instance, in the allocation of development aid. In the meantime, though measurement and classification occur on the basis of seemingly technical, indicator-based assessments, the political and normative nature of the underlying claims can hardly be disguised.²⁵⁴

²⁵⁰ The indicators used are a compilation from various sources and hence include data that was not collected for the specific purpose of measuring fragility. Indicators are then typically aggregated to generate the index value that seeks to display a country’s degree of fragility, i.e. the extent to which it is failing in some fundamental respect to fulfill the functions attributed to a state and reflected in the choice of indicators. HARRIS, et al., ‘*Country Classifications for a Changing World*’, 17-23.

²⁵¹ MONTY G. MARSHALL & BANJAMIN R. COLE, Center for Systemic Peace, ‘*Global Report 2011. Conflict, Governance, and State Fragility*’ (2011), pp. 36-38 (Technical Notes); also BETHKE, ‘Zuverlässig invalide – Indizes zur Messung fragiler Staatlichkeit’, 25-26.

²⁵² For instance, economic and rational-choice literature, constructivist theories of international relations, and recently also international lawyers engaging with phenomena of global governance have studied the impact of indicators. For an overview, see KEVIN E. DAVIS, et al., ‘Indicators as a Technology of Global Governance’, 46 *Law & Society Review*, 71 (2012), 72-73.

²⁵³ JACKSON, *Quasi-states. Sovereignty, International Relations and the Third World*, 23.

²⁵⁴ BHUTA, ‘Governmentalizing Sovereignty: Indexes of State Fragility and the Calculability of Political Order’, 134 ff.; NEWMAN, ‘Failed States and International Order: Constructing a Post-Westphalian World’, 426-429; and from the perspective of postcolonial approaches, PAHUJA, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality*, 93, arguing that “quantifiable, and therefore putatively scientific” measures like the GNP have replaced old distinctions based on race or “civilization” as new tools for safeguarding hierarchies between states and the model of the West.

Despite the lack of a clear concept, let alone an agreed definition, the notion of fragile states has thus proceeded from the realm of academic research and political discourse to a stage where it directly informs policy-making in security, development, and other relevant fields of practice.²⁵⁵ For instance, the construction of state fragility as a complex and multi-dimensional challenge has affected the interaction of different policy fields and actors, and contributed to the incorporation of civilian components into military operations, to the “securitization” of development cooperation, and to fostering a closer linkage between humanitarian assistance and development cooperation.²⁵⁶ More broadly, since weak statehood has come to be recognized as a root cause for multiple problems, state-building, or tackling state fragility, is increasingly seen as a global public good, which requires a concerted effort across institutions and policy fields.²⁵⁷

In development cooperation, these policy shifts have been accompanied by a commensurate increase in resource flows to fragile states. According to the OECD, the amount of official development assistance (ODA) going to fragile and conflict-affected states has more than doubled between 2000 and 2010, when it accounted for 37% of all ODA.²⁵⁸ These additional resources flows have usually concentrated in countries or regions of strategic interest to the West, but have also benefited long-forgotten crisis and aid orphans.²⁵⁹ The distribution of resources to specific projects and programs has equally been affected, regularly benefiting those with a focus on

²⁵⁵ E.g. NEWMAN, 'Failed States and International Order: Constructing a Post-Westphalian World', 438-439; or CALL, 'The Fallacy of the 'Failed State'', 1494-1495, arguing that “the failed state concept has acted as a corrective to prevalent approaches to promoting peace, development, or humanitarian assistance. [...] It has also enhanced the linkage not just between international security and internal stability among poor, peripheral societies, but also that between basic freedoms and service delivery within small, powerless societies and the interests of Western powers and regional powers.”

²⁵⁶ An obvious example is the US Presidential Policy Directive on Global Development adopted in September 2010, which states that “Development is thus indispensable in the forward defense of America’s interests in a world shaped by growing economic integration and fragmenting political power, by the rise of emerging powers and the persistent weakness of fragile states”. THE WHITE HOUSE, 'Fact Sheet: U.S. Global Development Policy' (September 22, 2010).

²⁵⁷ KHARAS & ROGERSON, 'Horizon 2025. Creative Destruction in the Aid Industry', 26, arguing that „[a]bsolute poverty’s dense concentration in 2025 in fragile states [...] elevates tackling fragility into a global as well as regional public good – indeed, perhaps the next frontier of globalization.”

²⁵⁸ OECD, 'Fragile States 2013. Resource Flows and Trends in a Shifting World', Figure 2.1 (p. 46). Since 2011, however, aid to fragile states has started declining somewhat. See also DAVID CARMENT, et al., 'State Fragility and Implications for Aid Allocation: An Empirical Analysis', 25 *Conflict Management and Peace Science*, 349 (2008).

²⁵⁹ OECD, 'Fragile States 2013. Resource Flows and Trends in a Shifting World', Figure 2.14 (p. 66). In 2010, by far the largest share of resources went to Afghanistan, followed by Ethiopia, DRC, Pakistan, Haiti, Tanzania, West Bank and Gaza, Iraq, Sudan, and Nigeria.

institution-building and governance reforms, often in core sectors like security and justice.²⁶⁰

Moreover, in development cooperation, donors have been turning research findings into policy recommendations and subsequent action, i.e. operationalizing the notion of fragile states. The understanding that fragile states feature some specific characteristics, constraints or needs has come to inform strategies and approaches, aid allocation schemes, the choice of aid instruments, and the design of specific projects and implementation tools. All of the major bilateral donor agencies have issued corresponding strategies, policy documents, and guidelines. For instance, USAID has drafted a Fragile States Strategy in 2005, the same year that the UK Department for International Development (DFID) issued a policy paper on “Why we need to work more effectively in Fragile States”.²⁶¹ The German Ministry for Economic Cooperation and Development (BMZ) has adopted a first concept note on engaging with fragile states in 2007, and, together with the German Foreign Office and the Federal Ministry of Defense, a set of inter-ministerial guidelines to improve policy coherence.²⁶² Further, as the overview in the following section serves to illustrate, virtually all international development organizations have begun to adopt strategic and policy documents, and to adjust aid processes and instruments for engaging with fragile states.²⁶³

Against this background, the question is not just on what basis states are designated as fragile, and what are the consequences. The aggregated effects of the reiteration, measurement, and operationalization of the notion of fragile states are far from unidirectional, but certainly substantial. The social construction of fragile states has often involved throwing “a monolithic cloak over disparate problems that require tailored solutions”, and inspired intrusive and paternalistic policy prescriptions.²⁶⁴ At

²⁶⁰ Ibid., Figures 2.9 and 2.10 (p. 58), on the evolving allocation of aid to fragile states per sector.

²⁶¹ See USAID Fragile States Strategy (January 2005) and the reference to fragile states in the US Global Development Policy Fact Sheet (September 22, 2010); DFID’s Policy Paper, Why we need to work more effectively in fragile states (2005); Canada’s International Policy Statement, A Role of Pride and Influence in the World (2005); and France’s Policy Paper on Fragile States and Situations of Fragility (2007).

²⁶² BMZ Entwicklungsorientierte Transformation bei fragiler Staatlichkeit und schlechter Regierungsführung, BMZ Konzepte 149 (2007) and “Für eine kohärente Politik der Bundesregierung gegenüber fragilen Staaten - Ressortübergreifende Leitlinien” (*supra* note 79).

²⁶³ *Infra* chapter II.3 b), and with an overview of the fragile states agenda of major development organizations (EU, World Bank, OECD DAC, UN), CAMMACK, et al., ‘Donors and the ‘Fragile States’ Agenda: A Survey of Current Thinking and Practice. Report submitted to the Japan International Cooperation Agency’, pp. 95-107.

²⁶⁴ CALL, ‘The Fallacy of the ‘Failed State’’, 1495.

the same time, it has helped to direct attention to the specific needs of an often marginalized group of states, and allowed to expound the problems of unrealistic assumptions that inform the universalization of a particular model of statehood.

We also need to turn attention to the actors that are making these judgments, and to the processes through which the notion of fragile states progresses from discourse to action. In the context of ongoing transformations from an inter-state system to a multi-level system of governance, international organizations emerge as important actors in furthering a concerted response to state fragility: both as sites for intergovernmental policy-making and standard-setting, and through adapting their own processes and instruments.

2. A Challenge for International Development Organizations

In recent years, there has been an unprecedented surge of reforms and regulatory activity in multilateral development cooperation with fragile states. Before turning attention to how the notion of fragile states is thus operationalized, however, it is necessary to consider the challenges that have prompted such a proactive response from international development organizations. Multilateral development cooperation rests on a largely state-centric paradigm, which underscores the aid objectives, processes and instruments. Development organizations act on the assumption that recipient countries have effective governments – both in a formal, juridical sense, and from an empirical perspective, i.e. in terms of actual capacity on the part of state institutions. Accordingly, international development organizations face a number of challenges – technical, political, and legal – when seeking to engage in the typically weak-capacity and often high-risk environments of conflict-affected and fragile states, with sometimes no effective and functioning government counterparts.

In the subsequent section, I look in more detail at the state-centric development paradigm that informs multilateral development cooperation (a), and outline the various challenges that international organizations encounter in the context of fragile states (b).

a) The State-Centric Development Paradigm and its Premises

The traditional regime of development cooperation is largely state-centric. Development cooperation essentially constitutes an intergovernmental process through which, in the case of multilateral development cooperation, an international organization provides ODA funding to one or more recipient states.²⁶⁵ Recipient governments constitute the natural counterparts for international organizations: they negotiate and sign the agreements on the basis of which assistance is provided, participate in the design of projects and programs, and are responsible for their implementation. For based on the current aid orthodoxy, recipient states are expected to take the lead and assume responsibility for their own development. Accordingly, the state-centric regime of development cooperation is premised on the existence of a state with ‘effective government’ in a formal, juridical sense: a government with the legal capacity to express consent and to legally commit the country. Moreover, it is premised on the existence of governments with a certain level of institutional capacity and ‘good governance’, which are seen as preconditions for aid to be effective. Both aspects, juridical and empirical statehood, therefore influence under what conditions and how international organizations provide development funding.²⁶⁶

Why juridical statehood is generally a minimum condition for access to ODA becomes clear when considering that the transfer of ODA is essentially an intergovernmental process, and as such governed by international law. International organizations must treat recipient countries as legal sovereigns, which principally implies that they can engage only with the consent of the government in power.²⁶⁷ Moreover, international organizations generally provide development assistance on the basis of international legal treaties.²⁶⁸ These are negotiated and signed by the

²⁶⁵ *Supra* note 20. Assistance provided by a group of donor states to one or more recipient countries without being channeled through an international organization also constitutes multilateral development cooperation, but shall not be considered here.

²⁶⁶ See also MACRAE, et al., *'Aid to 'Poorly Performing' Countries: A Critical Review of Debates and Issues'*, para. 4.3 (p. xi), arguing that “development cooperation relies on three related but distinct conditions being in place: that a state exists; that the state is competent and legitimate; that there is an authority recognized and sanctioned internationally to represent that state. The status of these different elements of statehood influences significantly the form, channels and systems of aid management.” I discuss the role of the state in the law of development cooperation in MARIE VON ENGELHARDT, ‘Reflections on the Role of the State in the Legal Regimes of International Aid’, 71 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 451 (2011), pp. 454-456.

²⁶⁷ *Supra* note 25.

²⁶⁸ These treaties regulate a variety of aspects, for instance, certain obligations of recipients in connection with the carrying out of a development project. See MICHAEL RIEGNER & PHILIPP DANN,

governments of recipient countries, which possess the capacity to legally commit the country.²⁶⁹

The premise of juridical statehood is also clearly expressed in the legal frameworks of international development organizations, to which we will return later.²⁷⁰ The World Bank, for instance, is required by its founding treaties to provide financing only to its members countries, and only states can become members.²⁷¹ When the Bank provides loans to a country, it does so on the basis of a legal agreement concluded with the government, which thus assumes legal liability for the reimbursement of loans.²⁷² Even if the government of a member country is not itself the recipient of a loan, the Bank still has to conclude a guarantee agreement with the government, in order to create a contractual relationship under public international law.²⁷³ More generally, the World Bank deals with countries only through their governments.²⁷⁴ Any engagement with entities or stakeholders outside of the government is usually subject to the government's consent, as the organization is further explicitly prohibited to "interfere in the political affairs of any member".²⁷⁵

'Foreign Aid Agreements', in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (Oxford University Press, May 2011); and on the content of agreements and the procedural regime for their adoption, also DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 377-379 (on agreements concluded by the World Bank); and 391-392 (on the EU's financing agreements).

²⁶⁹ On the role of governments as executive organs of the state, capable of entering into legal obligations on the part of the country, see MAGIERA, 'Governments'; and on the conclusion of international legal treaties, see BROWNLIE, *Principles of Public International Law*, 579-583.

²⁷⁰ See *infra* chapter III.2, where I show how the sovereignty of recipient countries is reflected in the legal and policy frameworks of international development organizations.

²⁷¹ Articles of Agreement of the International Bank for Reconstruction and Development of 1944 (hereinafter IBRD Articles), Art. II Sect. 1 (Membership) in combination with Art. III Sect. 1 (a) "The resources and the facilities of the Bank shall be used exclusively for the benefit of members"; and Articles of Agreement of the International Development Association of 1966 (hereinafter IDA Articles) Art. II Sect. 1 and Art. V Sect. 1 (a).

²⁷² Due to the nature of the World Bank as an international financial institution that lends to its member countries, the conclusion of legal agreements also serves to secure the reimbursement of loans. Other organizations that provide non-refundable assistance, however, similarly conclude legal agreements with recipient states, which also See *supra* note 268.

²⁷³ IBRD Articles, Art. III Sect. 4 (i) and IDA Articles, Art. V Sect. 2 d); see also IBRAHIM F. I. SHIHATA, *The World Bank Legal Papers* (Kluwer Law International, 2000), pp. 126-127, explaining how only a treaty concluded with a member government qualifies as treaty under international law, and is hence subject to executive and legislative control within the country, and more easily insulated from domestic law.

²⁷⁴ Member states are requested to designate the governmental agencies for the Bank to deal with. IBRD Articles, Art. III Sect. 2 and IDA Articles, Art. VI Sect. 10. For the IBRD, the responsible governmental agency is usually the "Treasury, central bank, a stabilization fund or other similar fiscal agency." IBRD Articles, Art. III Sect. 2. In case of the IDA, the Articles only foresee the designation of an "appropriate authority" as "channel of communication" for the Association. IDA Articles, Art. VI Sect. 10.

²⁷⁵ IDA Articles, Art. V Sect. 1 lit e), together with the political prohibition clause in IBRD Articles Art. IV Sect. 10 and IDA Articles Art. V Sect. 6. Restrictions on engaging with entities other than the

The same principally holds true for most international organizations engaged in operative development cooperation. The founding agreements of other Multilateral Development Banks (MDBs) in particular – the AfDB, the ADB, but also those with a thematic rather than regional focus, like the International Fund for Agricultural Development (IFAD) – contain provisions that are largely similar to those of the World Bank. Membership is therein confined to states,²⁷⁶ the governments of member states constitute the primary recipients of aid,²⁷⁷ international involvement depends on state consent,²⁷⁸ and interventions in the political affairs of member states are prohibited.²⁷⁹ At the United Nations Development Programme (UNDP), the UN’s principal agency tasked with development cooperation, the governments of recipient countries approve and sign a Country Programme Action Plan with UNDP, which serves as a legal basis for its engagement.²⁸⁰ Development assistance provided by the European Union to the countries of the African, Caribbean, and Pacific (ACP) group of states currently rests on the Cotonou Agreement, an intergovernmental treaty.²⁸¹ The “central government” of a recipient country is therein explicitly recognized as “main partner” of the EU, whereas non-state actors are only eligible for financing “subject to the agreement of the ACP state”.²⁸²

The state-centric paradigm hence implies that the formal primacy of the sovereign state translates into the way that multilateral development cooperation is negotiated and agreed. Recipients that have the formal attributes of juridical statehood alone, however, are not able to assume a decisive role in planning and implementing

government are more clearly expressed in THE WORLD BANK, *'Guidance Note on Bank Multi-Stakeholder Engagement'* (2009).

²⁷⁶ Agreement establishing the Asian Development Bank (hereafter ADB Agreement), Art. 3; Agreement establishing the African Development Bank (hereafter AfDB Agreement), Art. 3 (1) “Any African country which has the status of an independent State may become a regional member of the Bank.”

²⁷⁷ ADB Agreement, Art. 11 and AfDB Agreement, Art. 14. Moreover, the purposes of both ADB and AfDB are to contribute to the development of member countries (Art. 1 and 2 and Art. 1 and 2 lit. a) respectively).

²⁷⁸ ADB Agreement, Art. 14 (iii) and AfDB Agreement, Art. 17 lit. (b).

²⁷⁹ ADB Agreement, Art. 36 (2); AfDB Agreement, Art. 38 (2).

²⁸⁰ The Country Programme Action Plan must be aligned with a country’s national development priorities and coordinated with other UN agencies through the UN Development Assistance Framework (UNDAF). Plans are signed by a “Government Coordinating Agency”, the designated government agency to coordinate with UNDP, which is regularly the government planning, finance, or foreign affairs ministry. See online, <https://info.undp.org/global/popp/ppm/Pages/Legal-Framework.aspx> (accessed November 2014).

²⁸¹ Cotonou Agreement, signed in Cotonou on 23 June 2000, last revision in Ouagadougou on 22 June 2010, OJ L 287, 04 November 2010 or OJ L 317, 15 December 2000. EU development cooperation is, however, also committed to the principle of participation of actors outside of the central government. See *infra* chapter V.2 a).

²⁸² Cotonou Agreement, Art. 2 Fundamental Principles and Art. 58 (2) lit (a).

development projects and programs. For this purpose, international development organizations equally expect recipients to have certain capacities, institutions, and policies in place, factors associated with empirical statehood.

The current aid orthodoxy that sustainable and inclusive development depends on “the existence of a unified and secure state, and a benign and competent government to run its institutions” is the result of a considerable evolution of the role of the state in development cooperation, an evolution that is paralleled with broader trends in international relations.²⁸³ Initially, development was understood as a mostly state-driven process, and organizations supported a strong role for the governments of newly independent nations in initiating economic activity, investments, agricultural development and industrialization. Yet in the 1970s and 1980s, inefficient public administrations, weak policies, and massive corruption came to be seen as major homegrown and state-related impediments to economic growth. For many years, development organizations advocated for reducing the role of the state in the economic process, in line with the neoliberal ideas encapsulated in the economic agenda of the “Washington Consensus”.²⁸⁴

Only in the late 1980s, mainstream development thinking began turning to the state again. Three important developments have since significantly shaped the role and responsibilities accorded to recipient governments in development cooperation. To begin with, the concept of development itself came to be conceived more holistically in all of its economic, social, and ultimately political facets, while a consensus emerged around the ultimate objectives of development cooperation: to

²⁸³ For an overview of the changing role of the state in development theory, see Fukuyama (*supra* note 7); JOHN MARTINUSSEN, *Society, State and Market. A Guide to Competing Theories of Development* (Zed Books, 1997), chapter IV; ADRIAN LEFTWICH, *States of Development. On the Primacy of Politics in Development* (Blackwell, 2000), pp. 71-104; or JACQUES KERSTENETZKY & CELIA LESSA KERSTENETZKY, 'The State as a Developmental Actor: State Forms for Social Transformation', in Bruce Currie-Alder, et al. (eds), *International Development. Ideas, Experience, and Prospects* (Oxford University Press, 2014).

²⁸⁴ The Washington Consensus refers to a set of policy prescriptions that were believed a necessary first step requirement for all countries to achieve economic growth, for instance, restructuring the bureaucratic apparatus, reducing public employment, privatizing certain industries, and deregulating markets. These policies go back to a study of JOHN WILLIAMSON, Institute for International Economics, *'Latin American Adjustment: How Much Has Happened?'* (1990). The World Bank and IMF used “structural adjustment loans” (SALs) to create incentives for such reforms. SALs often failed to improve the economic situation, however, and arguably contributed to the deterioration of social standards in many developing countries. For a critical assessment, see, for instance, PAUL MOSLEY, et al., *Aid and Power. The World Bank and Policy-based Lending*, 2 (Routledge, 1991), chapters 3 and 9; or TONY KILLICK, et al., *Aid and the Political Economy of Policy Change* (Routledge, 1998), pp. 160-172.

reduce poverty and increase human welfare.²⁸⁵ The results were a more comprehensive look at the state's actual performance in all of these areas – some of which traditionally belonging to the state's domestic affairs – and a more concrete conception of what was expected of the state in turn.

Second, the rise of good governance as a *leitmotif* in the 1990s reflects the emerging consensus that for aid to be effective, it requires a favorable institutional and policy environment.²⁸⁶ Macroeconomic evidence from cross-country regressions appeared to suggest that the impact of aid on growth and poverty-reduction was reduced in countries with poor policies and institutions.²⁸⁷ Hence, recipient states were expected to conduct public affairs and manage public resources in an efficient, transparent and responsible manner. International organizations became involved with an expanding agenda of political reforms to promote good governance along these lines, and more selective in the allocation of aid in the first place. The endorsement of good governance as a necessary ingredient, if not precondition for development has thus influenced the perceived role and expected functions of recipient states in an unprecedented manner.²⁸⁸ For many development organizations, the ideal state

²⁸⁵ An important influence on shifting the focus to a more holistic and human-centered conception of development, for instance, had the work of AMARTYA SEN, *Development as Freedom* (Oxford University Press, 2001). On the broadening of the notion of development along several dimensions, from economic development to sustainable development, human development and political development, see DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, at 127-129; or LEFTWICH, *States of Development. On the Primacy of Politics in Development*, pp. 40-70.

²⁸⁶ On the emergence of good governance in general, see the references in *supra* note 119; on the legal nature and content of good governance, DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 234-235; and with respect to the law of the European Union, DOROTHEE KUON, *Good Governance im Europäischen Entwicklungsrecht* (Nomos, 2010).

²⁸⁷ In 2000, US economists Craig Burnside and David Dollar furnished statistical data to undermine the correlation between economic growth and sound institutions and (monetary, fiscal, and trade) policies. BURNSIDE & DOLLAR, 'Aid, Policies, and Growth'. However, subsequent studies soon found that aid can still have positive outcomes in less favorable policy and institutional environments. E.g. WILLIAM EASTERLY, et al., Center for Global Development. CGD Working Paper # 26, 'New Data, New Doubts: Revisiting "Aid, Policies, and Growth"' (2003). Burnside and Dollar's findings were also severely criticized by DAVID ROODMANN, 'The Anarchy of Numbers: Aid, Development and Cross-Country Empirics', 21 *World Bank Economic Review* 255 (2007).

²⁸⁸ The good governance concept does *prima facie* not indicate whether more or less government is more conducive to achieving development, nor does it prescribe a certain form of government. The concept's emergence, however, has certainly entailed a growing concern with the question how different political systems influence governance, including considerations of democracy and human rights. Whether donors are explicitly committed to promoting democracy and the rule of law in development cooperation like the European Union, or remain focused on the more technocratic concept of good governance, like the World Bank, Philipp Dann therefore finds that "[t]he goal of all concepts is more stable and responsible statehood". DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 118.

became one capable of fulfilling certain core functions in an effective and efficient manner, while cooperating both with the private sector and civil society.²⁸⁹

Third, the success of the aid effectiveness agenda, reflected in the broad endorsement of five principles to improve the quality and impact of aid in the 2004 Paris Declaration on Aid Effectiveness, has firmly entrenched the understanding that aid effectiveness requires state effectiveness.²⁹⁰ In other words, not only do many governments rely on external aid to function effectively, for aid to be effective and sustainable, it is supposed to require a sufficient level of institutional capacity and good governance on the parts of recipients. Particularly the principle of ownership reflects how both the role and the according expectations of recipient states have grown over the last decades. Ownership prominently expresses the claim that recipient states should take the lead over their own development, which corresponds to an entitlement as well as duties and responsibilities.²⁹¹ For instance, recipients are responsible for formulating a national development plan, to guarantee broad-based participation in that process, and to maintain the institutions necessary for its implementation.²⁹²

These broader trends concerning the role of the recipient state find expression in a proliferating number of political declarations and standard-setting instruments that

²⁸⁹ See, for instance, THE WORLD BANK, 'Good Practice Note for Development Policy Lending. Development Policy Operations and Program Conditionality in Fragile States' (June 7, 2005), 7, listing revenue collection, public expenditure management and civil service appointment as desirable state functions, but also functions that relate to "state authority" (e.g. security services) and to "state legitimacy" (e.g. the holding of elections).

²⁹⁰ The Paris Declaration (*supra* note 21), concretized and strengthened by the Accra Agenda for Action in September 2008, and developed further by the Busan Partnership for Effective Development Cooperation of November 2012. The Paris Declaration is not hard law, but some overlap exists between its five principles and norms of international law. LEONIE VIERCK & PHILIPP DANN, 'Paris Declaration on Aid Effectiveness (2005)/Accra Agenda for Action (2008)', in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (Oxford University Press, April 2011), paras. 14-17.

²⁹¹ The OECD DAC has defined "national ownership" as "[t]he effective exercise of a government's authority over development policies and activities, including those that rely – entirely or partially – on external resources. For governments, this means articulating the national development agenda and establishing authoritative policies and strategies." See the OECD's Glossary of Statistical Terms, available online: <http://stats.oecd.org/glossary/detail.asp?ID=7238> (accessed October 2014). For a critical discussion of the idea of ownership in the practice of development cooperation, see WILLEM H. BUITER, 'Country Ownership': A Term Whose Time has Gone', 17 *Development in Practice*, 647 (2007); also JOHN PENDER, 'Country Ownership: The Evasion of Donor Accountability', in Christopher J. Bickerton, et al. (eds), *Politics without Sovereignty. A Critique of Contemporary International Relations* (UCL Press, 2007).

²⁹² E.g. Paris Declaration (*supra* note 21), para. 14 ("developing and implementing their national development strategies through broad consultative processes"), or para. 20 ("ensure that national systems, institutions and procedures for managing aid and other development resources are effective, accountable and transparent").

inform the conduct of development cooperation. For instance, virtually all international organizations engaged in development cooperation have committed to adhere to the principles of ownership and alignment, mutual accountability and results included in the 2004 Paris Declaration, or to the principles of partnership, transparency and shared responsibility included in the 2013 Busan Partnership for Effective Development Cooperation.²⁹³ The Paris Principles clearly convey the central tenets of the state-centric development paradigm: on the one hand, that recipient states are recognized as equal partners with the primary responsibility for their own development, and on the other hand, that recipients are expected to provide the enabling (transparent, accountable) environment necessary for rendering aid effective.

Apart from being expressed in high-level policy statements, such trends have profoundly affected the way in which international development organizations plan, manage, and deliver assistance. To a greater or lesser extent, all international organizations have made the fulfillment of good governance-related political and macroeconomic requirements a decisive factor in determining the volume of aid, the choice of aid instruments, or the continuation of projects and programs. For instance, MDBs like the World Bank, the African Development Bank, or the Asian Development Bank, allocate resources to low-income countries on the basis of assessments of their policies and institutions, including in the area of good governance.²⁹⁴ Other donor organizations like the European Union or the European Bank for Reconstruction and Development (EBRD), explicitly condition assistance on a country's adherence to democratic principles and human rights.²⁹⁵ The idea of country ownership, in turn, is reflected in the fact that development organizations increasingly build on the country's own development objectives and priorities, which

²⁹³ For a full list of international organizations and states adhering to the Busan Partnership Agreement, see online: <http://www.oecd.org/dac/effectiveness/busanadherents.htm> (accessed December 2014).

²⁹⁴ I will analyze this process of resource allocation based on a so-called Country Policy and Institutional Assessment (CPIA) in detail in *infra* chapter IV.2, with regards to the World Bank. The ADB and the AfDB use very similar systems of performance-based allocation. See, for instance, the ADB's Policy on Performance-based Allocation for Asian Development Fund Resources (February 2001).

²⁹⁵ E.g. LORAND BARTELS, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press, 2005); and *infra* chapter V.2 b). The EBRD may only use its resources and facilities and conduct its operations in countries committed to principles of democracy. See EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, 'Political Aspects of the Mandate of the European Bank for Reconstruction and Development'.

are regularly set out in Poverty Reduction Strategy Papers (PRSPs).²⁹⁶ Ownership has also become a fundamental principle guiding the EU's cooperation with ACP countries.²⁹⁷ Moreover, the increasing use of aid instruments that allow a greater say for recipient governments in determining the use of ODA, such as budget assistance, equally reflect the shift towards more recipient ownership in development cooperation.²⁹⁸

The conviction that external assistance is successful and sustainable where it builds on effective and accountable state institutions is hence reflected in the objectives, processes, and instruments used in multilateral development cooperation – and as we will see later, in the legal and policy frameworks of international development organizations.²⁹⁹ Development organizations operate on the assumption that governments are in principle capable of fulfilling certain requirements in the development process, and can serve as a counterpart for the donor community. They expect that recipient governments have the capacities and institutions necessary for taking the lead in planning and implementing development projects, in a participatory manner, in line with environmental and social standards, and guaranteeing the transparent and accountable use of ODA. In other words, what they look for is literally effective governments – governments that conform to an array of requirements concerning their functions and expected performance in the development process. Such requirements are generally dependent on the particular ideas and preferences of different donors.

Ultimately, the state-centric paradigm of development cooperation and its premises in terms of both juridical and empirical statehood lead to a peculiar paradox.

²⁹⁶ Poverty Reduction Strategies have become a central tool whereby recipient states establish their development priorities and plans in a country-driven process, and are referred to not just by the World Bank and IMF, but also other multilateral and bilateral donors. For instance, the World Bank develops Country Assistance Strategies on the basis of a “country’s vision of its development goals”. See the World Bank’s Bank Procedures (BP) 2.11 on Country Assistance Strategies, November 2011, para. 2.

²⁹⁷ Cotonou Agreement, Art. 2; see also the European Consensus on Development, listing ownership, partnership, and in-depth political dialogue as common principles in para. 4. Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: ‘The European Consensus’, (2006/C 46/01), 24.2.2006.

²⁹⁸ MACRAE, et al., *'Aid to 'Poorly Performing' Countries: A Critical Review of Debates and Issues'*, 12, stating that the “aid effectiveness literature also informed the development of new forms of aid instrumentation, specifically Poverty Reduction Strategies (PRS) and Direct Budget Support (DBS)”, which “require a high degree of trust between donor and recipient country and [...] imply a strong degree of legitimisation of the recipient government.”

²⁹⁹ See *infra* chapter III.2, where I provide an overview of the substance of rules that generally guide the conduct of international development organizations.

International organizations operate on the basis of the assumption that recipient counterparts have an effective government, while they are essentially concerned with strengthening government effectiveness. They are simultaneously bound to respect the sovereignty of recipients, and committed to establishing the conditions required for sovereignty to be exercised.³⁰⁰ This paradox is particularly apparent in the context of multilateral development cooperation with fragile states.

b) On the Manifold Challenges of Engaging with Fragile States

In 2009, the World Bank's President declared that fragile states are "the toughest development challenge of our era".³⁰¹ A large consensus has emerged among donors that fragile states need assistance in building the capable and responsive institutions necessary to escape from cycles of poverty and conflict. Donors also agree, however, that achieving positive and lasting development results in the absence of basic institutional structures and capacities is exceptionally difficult. In other words, fragile states may be seen as the toughest development challenge because they face particular development challenges, and because they pose particular challenges to development cooperation. Many of the challenges for international organizations engaging with fragile states owe to the fact that they operate on the basis of a state-centric development paradigm.

First, it bears repeating that the growing concern with the development challenges of fragile states relates to a changing global policy environment as well as shifting expectations of the state.³⁰² In short, it is now much easier for a state to be regarded as

³⁰⁰ The according tension underlying donor-recipient relations is somewhat characteristic for the regime of development cooperation, but becomes more obvious with regards to fragile states. See, for instance, DOMINIK ZAUM, *The Sovereignty Paradox: The Norms and Politics of International State-Building* (Oxford University Press, 2005), 4-5, referring to a „sovereignty paradox“ with regards to the state-building practice of international transitional administrations, which compromise the right to self-government as one element of sovereignty, in order to implement domestic reforms and strengthen local political institutions to ultimately strengthen sovereignty. See also MATTHEW SAUL, 'From Haiti to Somalia: The Assistance Model and the Paradox of State Reconstruction in International Law', 11 *International Community Law Review*, 119 (2009); STEIN SUNDSTOL ERIKSEN, 'State failure' in Theory and Practice: The Idea of the State and the Contradictions of State Formation', 37 *Review of International Studies*, 229 (2011), 246; and with a critical perspective, WILLIAM BAIN, 'For Love of Order and Abstract Nouns: International Administration and the Discourse of Ability', 3 *Journal of Intervention and State-Building*, 143 (2009), 56-58.

³⁰¹ *Supra* note 134.

³⁰² On the two narratives underlying the international community's concern with fragile states in general, see *supra* chapter I.2 b); on the changing expectations of the state in development cooperation, see *supra* chapter II.2 a).

fragile if the opposite – effective or resilient statehood – is seen to require not just the maintenance of a minimum level of law and order (‘effective government’), but also the transparent, accountable, participatory conduct of public affairs (‘good government’).

At the same time, empirical data is readily available to substantiate the dire situation and elevated needs of states considered as fragile. Approaching 2015, most fragile states are unlikely to achieve any of the MDGs.³⁰³ Based on World Bank statistics, poverty rates in fragile and conflict-affected states are on average 21% higher than in developing countries that are not affected by conflict; their populations are twice as likely to be undernourished, and children are three times as likely to be out of school.³⁰⁴ The governments of fragile and conflict-affected low-income countries spend less than half the amount of public resources on government services in the realm of education, health, security and administration than other developing countries.³⁰⁵ The aggregated effects of these facts and figures concern about 1.5 billion people living in fragile states, amounting to one sixth of the world’s population.

What makes development cooperation with fragile states so challenging?³⁰⁶ Many challenges that development actors face in the context of fragile states are in one way or another related to the security situation. Fragile states often constitute insecure and politically instable environments, and many experience ongoing conflicts. Security concerns can complicate, if not prevent the engagement of development actors on the ground. Insecure or highly volatile political environments also make it difficult to generate or obtain reliable information required for planning development interventions, or to articulate longer-term objectives and priorities required for multi-annual, strategic planning. Different and potentially conflicting objectives may prevail in the short term, and require, for instance, the prioritization of security and reconstruction needs over more long-term development goals in countries affected by conflict. Particularly in the context of non-linear crises, where circumstances are in flux and there is a constant danger that violent conflict re-erupts, projects can often

³⁰³ *Supra* note 31.

³⁰⁴ THE WORLD BANK, 'World Development Report: Conflict, Security, and Development', 60-65.

³⁰⁵ Normal developing countries are found to spend USD 267 per person every year, as opposed to USD 131 per person (purchasing power parity adjusted) in fragile states. *Ibid.*, Table 7.2 (p. 236).

³⁰⁶ The question why fragile and conflict-affected states constitute particularly challenging environments for development cooperation has been subject to extensive research and analysis. See the references provided in *supra* notes 19 and 23. The findings of the World Bank’s 2011 World Development Report to a large extent summarize the state of the art. See *ibid.*.

not be implemented as planned. Further, in light of the often complex political economy of fragile states, the risk is higher not only that projects remain ineffective, but that funds are misused or end up exacerbating existing societal tensions or ethnic conflicts. In addition, non-linear crises often involve a plurality of development, humanitarian, and military actors that operate alongside each other. While the line between peace, conflict, and crisis or emergency blurs in practice, these different actors have competing mandates, objectives, and *modi operandi*, and coordination between them remains difficult. For instance, insufficient coordination regularly leads to gap between crisis response and longer-term recovery.³⁰⁷

Yet fragile states do not only constitute particularly challenging environments for international development actors. They also bring to light a considerable disconnect between central tenets of the state-centric development paradigm and empirical circumstances. Empirical circumstances often do not conform to the assumptions in terms of juridical or empirical statehood that we have seen inform the processes and aid instruments whereby international organizations generally provide assistance. Or conversely, international development organizations require precisely what many conflict-affected and fragile states lack. They operate primarily with and through governments, and are usually bound to do so by the legal framework in which they operate. In a formal, juridical sense, international development organizations need national governments as contractual partners, able to legally commit the country. In addition, national governments are valued as principal providers of law and order, of security and other basic services. Development cooperation accordingly remains strongly focused on the formal institutions of the state.

What if no government in power can be identified, or more than one entity claims power? What if the government formally in power lacks even the most basic capacities to exercise control beyond the capital? And what if the government that is supposed to serve as a counterpart in development cooperation has lost not only any meaningful authority, but also legitimacy in the eyes of the population?

These questions point to the intricate blend of legal, political, and technical challenges that development cooperation with fragile states can involve – challenges that are not necessarily characteristic of fragile states, but often go along with weak

³⁰⁷ For a comprehensive account of the difficulties facing development and humanitarian actors in protracted crisis including policy implications, see ADELE HARMER & JOANNA MACRAE, Overseas Development Institute, HPG Research Report 18, '*Beyond the Continuum. The Changing Role of Aid Policy in Protracted Crises*', July 2004 (July 2004).

governance, political instability and conflict. On the one hand, they engage the minds of international lawyers who work in the legal departments of international development organizations. Lawyers need to identify a government counterpart that can formulate an official request for assistance, or sign off the legal agreements on the basis of which assistance is provided. Difficulties emerge if either the juridical status of the state, or the legal authority or international recognition of the government is in doubt.³⁰⁸ This is not only the case in an exceptional situation like Somalia, where no effective government emerged for over a decade. The legal status of statehood may be contested, for instance, in situations immediately following state creation (e.g. Kosovo), in states or territories that are temporarily administered by the UN (e.g. East Timor, Kosovo), or in territories with relatively effective government but a permanently unresolved legal status (i.e. *de facto* regimes like Somaliland, or Palestine). The fact that Somaliland has not yet been recognized as an independent state has generally precluded the *de facto* regime from receiving international development assistance.³⁰⁹ Difficulties in identifying the government in power after an unconstitutional change of government took place, for example after a military coup or in a post-conflict situation (e.g. occupied Iraq in 2003), regularly lead to an interruption of aid flows.

On the other hand, even if a government or interim authority can be identified, as is still most often the case, weak governmental authority in fragile states is regularly complemented by informal, non-state forms of governance.³¹⁰ In this context, the disproportionate focus in development cooperation on the formal institutions of the state and the central state level often obstructs the view at the drivers of fragility, and

³⁰⁸ Both are factors that are rarely addressed in academic literature concerned with the challenges of development cooperation with fragile states. An exception is the Overseas Development Institute (ODI) study on “poorly performing countries” quoted in *supra* note 24. The authors find that countries are likely to be difficult to assist if the “juridical or legal basis of the state is contested” or if “[i]nternational support and recognition of the incumbent regime is withheld or ambivalent” (p. xi-xii).

³⁰⁹ Importantly, the lack of or unresolved legal status of a state or government generally precludes an entity from receiving traditional forms of government-to-government assistance that require the conclusion of an international legal agreement between donor and recipient. As we will see later, other forms and channels of aid can remain open, for instance, humanitarian assistance, or ODA provided through trust funds. See *infra* chapter IV.3 on the World Bank, and chapter V.1 a) and 2 c) with examples from the AfDB, the ADB, and the EU.

³¹⁰ On the importance of non-state actors and non-traditional forms of governance in fragile states, see, for instance, FISCHER & SCHMELZLE, '*Building Peace in the Absence of States - Challenging the Discourse on State Failure*'; JAMES PUTZEL & JONATHAN DIJOHN, LSE Crisis States Research Centre '*Meeting the Challenges of Crisis States*' (2012); LEMAY-HÉBERT, '*Statebuilding without Nation-building? Legitimacy, State Failure and the Limits of the Institutional Approach*'; and the references in *supra* note 135.

limited its effectiveness and reach. Identifying non-state actors to deal with can be challenging for intergovernmental organizations that have always been dealing with national governments as primary interlocutors. Particularly in post-conflict settings, civil society is often weak and fragmented – apart from the fact that the form and functions of civil society may substantially differ from its Western understanding. Dealing with non-traditional actors like warlords or rebel forces and choosing interlocutors among them is obviously extremely difficult and politically sensitive.

No less difficult and politically sensitive for international development organizations is engaging with a government that is formally in power and effective control, but violates the human rights of its citizens. In such a situation, development organizations face the critical question of how to continue supporting a population in need, while avoiding the risk of supporting or legitimizing the government, and ultimately becoming complicit in its actions. Repressive governments are not a necessary characteristic of fragile states. Where governments appear more engaged in rent-seeking and clientelism than providing basic services, however, or otherwise lack legitimacy within the population, they are deemed by donors as “unresponsive”, “difficult partners”, or “spoilers”, rather than vital partners in development.³¹¹

Apart from questions concerning the legal or legitimate authority for international organizations to engage with, the significant lack of capacity on the part of national governments in fragile states can cause many more difficulties in development cooperation. Fragile states are often in urgent need of external assistance, but simply lack the capacity to qualify for assistance in the first place, or to ensure that projects and programs are later implemented effectively. We have seen that international organizations regularly condition aid on the fulfillment of an array of requirements concerning the institutions and policies thought necessary for aid to be effective, to conform with fiduciary, environmental or social standards, or to ensure the accountable use of ODA.³¹² Safeguarding such standards may appear particularly warranted in countries where national standards are low. At the same time, insisting

³¹¹ State fragility is still primarily conceptualized in terms of the government’s lack of capacity, rather than legitimacy, since governments that command sufficient resources but deliberately choose to starve or otherwise oppress their population fortunately remain a marginal phenomenon. Weak state legitimacy is increasingly seen as intrinsically linked to a lack of state capacity and authority, however, and hence as a factor contributing to state fragility. See, for instance, OECD, *The State’s Legitimacy in Fragile Situations. Unpacking Complexity*. The World Bank also increasingly focuses on the legitimacy of state institutions in defining fragility (see *supra* note 148).

³¹² *Supra* chapter II.2 a).

on the same level of substantive and procedural requirements can prohibit any donor engagement – and donors increasingly acknowledge the risks associated with inaction or delayed action in already fragile states.³¹³ Besides, for a weak government, the struggle to meet the aggregated requirements of various donors concerning project approval, implementation, and reporting will likely put a strain on its already limited capacities.³¹⁴ In practice, the result is often that implementation is bumpy, or institutions are created as mere camouflage.³¹⁵

Very weak capacity can also hamper a government's ability to assume ownership. Realizing the principle of ownership regularly involves that recipients prepare a comprehensive national development plan on the basis of broad-based consultations, and seek an active role in planning, implementing, and monitoring projects – activities that all presume considerable institutional and administrative capacities and human resources.³¹⁶ Accordingly, even relatively extensive and formalized guarantees of national decision-making power and participation in processes of multilateral development cooperation are only as effective at ensuring national autonomy as governments have the capacity – and intent – to realize them.

Ultimately, engagement with fragile states often involves a dilemma. In light of their limited capacity or weak governance, substituting or bypassing state institutions appears warranted in the short term. Yet, bypassing state institutions reduces national autonomy and risks undermining the longer-term objective of strengthening their capacity.

In sum, fragile states pose a challenge to multilateral development cooperation since in accordance with the state-centric development paradigm, development

³¹³ On the risk of inaction and how it can outweigh the risks associated with action in fragile states, see, for instance, OECD, *'Managing Risks in Fragile and Transitional Contexts. The Price of Success?'* (2011); or THE WORLD BANK, *'IDA 17. IDA's Support to Fragile and Conflict-Affected States'* (March 2013), paras. 5, 21.

³¹⁴ In general, see KINGSBURY & DAVIS, *'Obligation Overload: Adjusting the Obligations of Fragile or Failed States'*.

³¹⁵ LANT PRITCHETT, et al., Center for Global Development Working Paper 234, *'Capability Traps? The Mechanisms of Persistent Implementation Failure'* (December 2010), referring to 'isomorphic mimicry' as a tactic of states to adopt certain organizational forms or best practices that are successful elsewhere as a mere camouflage, hiding their actual dysfunction.

³¹⁶ Forms of engagement that rely on country ownership or that favor the use of conditionality to ensure the effective use of ODA therefore face restrictions in fragile states. E.g. LAURENCE CHANDY, The Brookings Institution, Global Economy and Development Policy Paper 2011-12, *'Ten Years of Fragile States. What Have We Learned?'* (2011), p. 6. On particular constraints concerning the application of aid effectiveness principles in fragile states, see also OXFORD POLICY MANAGEMENT AND THE IDL GROUP, *'Evaluation of the Implementation of the Paris Declaration: Thematic Study. The Applicability of the Paris Declaration in Fragile and Conflict-affected Situations.'* (August 2008).

objectives, processes, and instruments usually rely on the presence of an effective and authorized, capable, and responsive government. The finding that international development organizations are challenged to a significant extent because of their own reliance on, or mandated obedience to fixed assumptions in terms of juridical and empirical statehood, has an important implication. It is not only – and perhaps not even primarily – internal factors that make these states a development challenge.³¹⁷ Rather, fragile states are perceived and singled out as exceptionally challenging environments on the basis of an analysis that is inevitably influenced by different interests, policy goals, and eventually mandate constraints. Behind the identification, conceptualization, and response to fragile states as a development challenge stand actors that are, within the confines of their particular mandates, making judgments and taking decisions – for instance, on the legal status or effectiveness of a government, on the capacity of institutions, or on the quality of governance. On this basis, the following section sketches how international development organizations are responding to the challenges associated with engaging in fragile states.

3. An Evolving Response

Specific attention to fragile states in the development community commenced with the World Bank's establishment of a taskforce on "Low Income Countries Under Stress" (LICUS) in 2001. Since then, the OECD Development Assistance Committee (DAC), a forum composed of the most important, traditional donor organizations, has assumed a central role in developing general principles and guidelines concerning the design, management, and delivery of ODA to fragile states.³¹⁸ Broadly speaking, such principles and guidelines are concretized by international organizations engaged in operative development cooperation: international financial institutions and regional

³¹⁷ See also MACRAE, et al., *'Aid to 'Poorly Performing' Countries: A Critical Review of Debates and Issues'*. The authors analyze the performance of different developing countries against two sets of indicators, economic growth and infant mortality, and find that few countries appear consistently across indicators and time as performing poorly. Therefore, country performance alone does not explain why certain countries are perceived as particularly challenging environments – rather, "the problem of poorly performing countries must also be understood as relational, in other words that the labeling of a country as poorly performing is in part a reflection of the political, security and aid relations between that country and the international community." (p. xi). On external factors that influence fragility, see also OECD, *'Think Global, Act Global: Confronting Global Factors that Influence Conflict and Fragility'* (September 2012).

³¹⁸ Importantly, the OECD does not itself provide ODA to developing countries, but is only engaged in development policy-making. On the understanding of international development organizations that I use in this thesis, see *supra* note 3.

development banks, the UN, and the EU. These organizations do not only refer to the outcomes produced by high-level policy fora. Responding to the practical and – depending on the mandate – legal challenges they face when engaging with fragile states, many have revisited their own strategies, processes, and financial instruments for dealing with fragile states, sometimes long before the phenomenon came to be termed as such. The lessons from research and reform initiatives in turn influence the development of more general principles for dealing with fragile states in high-level policy fora like the OECD DAC. Although the regime of development cooperation is not structured hierarchically and composed of organizations with different mandates, through such processes of mutual influence or ‘cross-fertilization’ between institutions, their understanding of and emerging response to fragile states becomes increasingly consistent.³¹⁹

To get a better sense of these processes and outcomes, the following section studies the development policy-making and standard-setting activities concerning fragile states in the context of the OECD DAC (a), and provides a first overview of the type of strategic shifts and operational reforms undertaken by selected international organizations (b).

a) Policy-making and Standard-setting in the Context of the OECD DAC

The OECD DAC is a grouping of the traditionally most important donors of development aid, that is 28 OECD member countries and the EU.³²⁰ Created by Ministerial Resolution in 1960, the intergovernmental committee does not itself provide ODA, but is mandated to promote cooperation by reviewing, analyzing, and providing guidance on development policies and practices.³²¹ The OECD DAC is not

³¹⁹ With a systematic analysis of the processes whereby the World Bank and OECD have shaped the concept of fragile states, see NAY, 'International Organisations and the Production of Hegemonic Knowledge: How the World Bank and the OECD helped invent the Fragile State Concept'. Nay argues that the concept was originally invented by a small group of bilateral donors, but successfully promoted and disseminated through international organizations, acting as ‘norm entrepreneurs’ in constant interaction with other organizations, policy forums, and knowledge networks.

³²⁰ On the functions and functioning of the OECD DAC, see OECD, *'Inside the DAC'* (2009-2010). A list of participating member states is accessible online: <http://www.oecd.org/dac/dacmembers.htm> (accessed December 2014). The World Bank, the IMF, and UNDP have permanent observer status.

³²¹ See OECD DAC, DAC Mandate 2011-2015, Resolution of the Council Revising the Mandate of the Development Assistance Committee, October 18, 2010 (Doc. DCD/DAC(2010)34/FINAL). On the influential role of the OECD DAC in defining and monitoring standards for development assistance rendered by traditional donor countries, see JULIA SATTELBERGER, *'Authority Through Regulation (Working Title)'* (forthcoming); and in general, MARTIN MARCUSSEN, 'OECD Governance through Soft

vested with the power to enforce compliance with its decisions either, but exerts influence by promoting certain policies and standards. It is assisted by the Development Co-operation Directorate (DCD), which acts as its Secretariat and provides technical expertise and operational capacity.

As a norm entrepreneur, the OECD DAC has also significantly contributed to development policy-making and standard-setting regarding fragile states.³²² Already the landmark Paris Declaration of 2005 expresses the idea that fragile states require a differentiated approach, given their weak capacity and poor governance.³²³ In 2007, OECD ministers formally adopted a special set of guidelines to complement the Paris Declaration, the “Principles for Good International Engagement in Fragile States and Situations”.³²⁴

The ten principles reflect the emerging international consensus that state-building is the central objective in fragile states. To support this objective, international actors should focus on strengthening the capacity, legitimacy, and accountability of state institutions, and refrain from bypassing state institutions and building parallel systems.³²⁵ Further, the Principles demand international actors to tailor their operational response to the specific situation of each country, namely the “different constraints of capacity, political will and legitimacy”.³²⁶ International actors should adapt to different contexts through the choice of (more or less government-centered) aid instruments, and by reaching out to actors outside of the government to align with local priorities in the absence of strong government leadership and good

Law', in Ulrika Mörtz (ed) *Soft Law in Governance and Regulation. An Interdisciplinary Analysis* (Edward Elgar, 2004), highlighting that the OECD does not produce much hard law, but exerts considerable influence in the form of normative and cognitive governance.

³²² See also NAY, 'International Organisations and the Production of Hegemonic Knowledge: How the World Bank and the OECD helped invent the Fragile State Concept'; BARANYI & DESROSIERS, 'Development Cooperation in Fragile States: Filling or Perpetuating Gaps?'; and on the DAC's evolving thinking on fragile states in particular, MEGAN M. GLEASON, 'OECD's Evolving Engagement on Development and Security', in JAKE SHERMAN, et al., New York University Center on International Cooperation, *Engagement on Development and Security: New Actors, New Debates* (September 2011).

³²³ Paris Declaration (*supra* note 21), paras. 7, 37-39. The OECD's focus on the specific development challenges of countries with weak institutional capacity or political commitment began in 2001, with a series of discussions on “poor performers” and “difficult partnerships”, resulting in the creation of a Fragile State Group in 2003.

³²⁴ Fragile States Principles (*supra* note 144). The Principles were first agreed at a Senior Level Forum on Aid Effectiveness in Fragile States in January 2005, which was co-sponsored by the World Bank and OECD-DAC. They were piloted before being adopted in April 2007, together with an OECD Ministerial Policy Commitment to improve development effectiveness in fragile states (DCD/DAC(2007)29).

³²⁵ Fragile States Principles, paras. 3 and 7.

³²⁶ Fragile States Principles, para. 1: “Take context as a starting point”.

governance.³²⁷ In addition, the “Do no harm” principle requires all international actors to adopt a cautious approach and avoid exacerbating societal tensions or conflict when engaging in fragile states.³²⁸ Originally developed to guide the work of humanitarian organizations during conflict, the principle’s extension to a range of international actors and beyond conflict reflects how aiding fragile states is understood to require a concerted response and synthesis approach from humanitarian, development, and other actors.³²⁹

Though the Fragile States Principles are stipulated in a non-binding policy declaration, they have become a central reference and yardstick for international actors engaging in fragile and conflict-affected states.³³⁰ The Principles are, however, formulated in relatively vague terms: instead of stating concrete requirements for donors, they put forth certain objectives and considerations to be taken into account. Although donors subsequently agreed a number of more concrete steps as part of the Accra Agenda for Action in 2008,³³¹ implementation of the Fragile States Principles in practice has therefore remained patchy.³³²

³²⁷ Fragile States Principles, para. 7, stating that if it is not possible or desirable to align with local priorities as conveyed by the government due to weak governance or violent conflict, international actors should seek to consult with national stakeholders outside of the government.

³²⁸ Fragile States Principles, para. 2, also requesting donors to consider the potential consequences of an abrupt suspension or termination of aid flows, for instance in response to serious cases of corruption or human rights abuses.

³²⁹ Several of the Fragile States Principles state the need to recognize linkages between political, security and development objectives (para. 5), as well as to improve policy coherence and practical coordination between political, security, development and humanitarian actors (para. 8). On the relation between different rules and principles for humanitarian and development aid, and on their overlapping in situations of fragility, see, for instance, VON ENGELHARDT, 'Reflections on the Role of the State in the Legal Regimes of International Aid', at 460, 471; HARMER & MACRAE, *'Beyond the Continuum. The Changing Role of Aid Policy in Protracted Crises'*; or ADELE HARMER & DEEPAYAN BASU RAY, Overseas Development Institute, *'Study on the Relevance and Applicability of the Paris Declaration on Aid Effectiveness in Humanitarian Assistance'* (March 2009).

³³⁰ Policy documents adopted by bilateral and multilateral donors regularly refer to the OECD’s Fragile States Principles, for instance, the AFRICAN DEVELOPMENT FUND, *'Strategy for Enhanced Engagement in Fragile States'* (2008) (at para. 7.1). The British Department for International Development (DFID) has produced a series of papers that offer detailed guidance on each of the ten Fragile States Principles. See DEPARTMENT FOR INTERNATIONAL DEVELOPMENT (DFID), *'Working Effectively in Conflict-affected and Fragile Situations. Summary Note'* (2010).

³³¹ The Accra Agenda for Action was adopted at the High Level Forum on Aid Effectiveness held in Ghana in 2008, and had one roundtable focusing on situations of fragility. In the follow-up document to the Paris Declaration, donors pledged to assist in building capacities for core state functions, to use more rapid and flexible financing instruments, and to work towards more realistic state-building objectives. The Accra Agenda also contains some requirements for recipient governments, e.g. to work with donors on a set of peace- and state-building objectives.

³³² So far two voluntary surveys through which the implementation of the principles is monitored yield that international practice of aid delivery and management in fragile states has not significantly improved in line with the principles. The two monitoring surveys of 2009 and 2011 are available online, <http://www.oecd.org/dac/incaf/monitoringthefragilestatesprinciples.htm> (accessed December 2014).

Since 2008, international policy-making and standard-setting processes concerning fragile states have become gradually more institutionalized. In Accra, a number of fragile states had demanded a greater say in policy-making processes that directly affect them – e.g. the setting of state-building objectives. In response, the “International Dialogue on Peacebuilding and Statebuilding” was initiated as an intergovernmental forum that brings together donor organizations and fragile states representatives, mostly from ministries of finance and development.³³³ The Dialogue was set up to elaborate and agree on common objectives and approaches, and is supported by a steering group and a Secretariat hosted by the OECD. In addition, the OECD DAC established the International Network on Conflict and Fragility (INCAF) as a subsidiary body in 2009. INCAF is mandated to review donor practices in line with the Fragile States Principles, to provide operational guidance, and to set international norms for development cooperation with conflict-affected and fragile states.³³⁴ In turn, a number of fragile states founded the g7+, a forum to advocate for their interests and to speak with a stronger, more uniform voice to international partners.³³⁵ The g7+ is supported by a Secretariat that acts as a counterpart to the International Dialogue’s Secretariat.

At high-level meetings, the participants of the International Dialogue – with the participation of the g7+ and decisive inputs from both Secretariats and INCAF – have since adopted a number of policy declarations that all build on the Fragile States Principles, but go further in formulating concrete commitments for donors and recipients alike. The 2010 Dili Declaration, for instance, expresses the common aspiration to develop “capable, accountable states that respond to the expectations and needs of their population”.³³⁶ The Declaration was still formulated without much participation from governments in fragile states, but the g7+ made unilateral commitments in a separate statement – using strikingly similar language.³³⁷ In 2011,

³³³ The International Dialogue was set up in 2008 and meets once per year at the ministerial or senior level. On the organization and functions of the Dialogue, as well as its participants, see online: <http://www.pbsbdialogue.org> (accessed December 2014).

³³⁴ INCAF convenes experts from governments and international organizations to provide analysis on cross-cutting issues of development, peace and security, and governance. See the INCAF Factsheet, available online: <http://www.oecd.org/dac/incaf/44282247.pdf> (accessed December 2014).

³³⁵ On the g7+, see also *supra* note 139.

³³⁶ Dili Declaration – A New Vision for Peacebuilding and Statebuilding, adopted at the first meeting of the International Dialogue on April 10, 2010.

³³⁷ The “Statement of the g7+”, Annexed to the Dili Declaration, contains unilateral political commitments of fragile states governments towards their population, for example regarding the

the surge of policy-making and standard-setting concerning fragile states finally culminated in the adoption of an international action plan, the “New Deal”, at the fourth High-Level Forum on Aid Effectiveness in Busan.³³⁸

The New Deal so far constitutes the most ambitious attempt of donors and recipients to commit to common objectives, and to implement a changed approach to the design, management, and delivery of ODA in fragile and conflict-affected states. It was endorsed by 35 countries, including all traditional donor countries and the g7+, as well as by a number of international organizations, namely the OECD, the UN Development Group, the World Bank, the AfDB, the ADB, and the EU.³³⁹ Though adopted in the form of a policy declaration, not an international legal treaty, the New Deal formulates explicit actions and is complemented by piloting, monitoring, and reporting mechanisms.³⁴⁰

Mutual commitments contained in the New Deal concern three areas. First, the document establishes five Peace- and Statebuilding Goals (PSGs), which formulate the broad objectives of strengthening “legitimate politics”, security, and justice, while creating economic foundations and enabling the state to deliver basic services. The PSGs shall inform development cooperation with fragile states, from donors’ funding decisions to country-level and country-led planning and implementation processes. Progress is measured against a set of indicators, which are developed and piloted jointly by fragile states and donors. Second, the New Deal promotes “new ways of engaging”, namely on the basis of a country-owned assessment of the causes and symptoms of fragility, which informs a country-owned national plan. The national plan is again implemented through a country-specific “compact”, a sort of strategic partnership agreement to which different donors commit in order to coordinate and harmonize their engagement.³⁴¹ Third, the New Deal contains commitments

transparency of public administration and financial management. The Statement also serves as the Charter of the g7+.

³³⁸ The New Deal, endorsed on the 30th of November 2011, at the 4th High Level Forum on Aid Effectiveness in Busan, South Korea. See online: <http://www.newdeal4peace.org/> (accessed December 2014).

³³⁹ For a list of supporters, see online <http://www.newdeal4peace.org/world-commitments/> (accessed December 2014).

³⁴⁰ The New Deal document itself mentions, but does not further specify the design and functioning of monitoring and reporting. Piloting of the New Deal takes places in a number of self-nominated countries, including Afghanistan, Central African Republic, Liberia, Sierra Leone, South Sudan and Timor-Leste.

³⁴¹ A compact constitutes a basic agreement between national governments and international partners on what should be delivered, and how, by interventions aimed at supporting a transition from fragility. It is not an international legal treaty, and does not contain any sanction mechanism. See, for instance,

concerning how aid is provided and managed, with the aim of making aid to fragile states more timely, reliable, and sustainable, the latter through strengthening country capacities and the use of country systems. Notably, capacity-building should balance support to state institutions and civil society actors, and enhance the capacity of the latter to participate in and monitor public decision-making. This balancing act informs the whole model for ODA delivery and management put forth in the New Deal: It is strongly committed to supporting “country-owned and -led pathways out of fragility”, while making equally strong demands concerning the participatory nature and inclusiveness of the processes and outcomes of such pathways.

Most of the recommendations concerning donor policies in fragile states contained in the New Deal are thus not new. They were already set out in the Fragile States Principles, and in a large number of research reports and policy guidance produced by INCAF, as well as international development organizations that operate in fragile states.³⁴² Whereas the Fragile States Principles consist of rather vague, political commitments made by donors unilaterally, however, the New Deal was agreed by donors and a coalition of fragile states. On the one hand, it prominently captures the evolving understanding and increasing convergence of international development actors on the particular characteristics and challenges of fragile states, together with concrete pledges to respond with a differentiated approach. On the other hand, the New Deal contains far-reaching commitments also by the governments of the g7+ countries, including on such matters as fostering “legitimate politics” – though with the push of the g7+, the language actually used in the New Deal’s implementation was watered down to “inclusive politics”.

In sum, particularly since the establishment of the International Dialogue and the g7+, we see a clear trend towards more inclusive processes of development policy-making and standard-setting concerning fragile states, together with more tangible commitments. Both the Fragile States Principles and the New Deal are political declarations, not international legal treaties, but they have received high-level

the Somali Compact for 2014-2016, available online:

<http://www.pbsdialogue.org/The%20Somali%20Compact.pdf> (accessed December 2014).

³⁴² For instance, the emphasis on state-building and the linkage between political, security, and development objectives, as well as donor commitments to ensure more sustainable and predictable aid flows, were all set out in the Fragile States Principles (*supra* note 144). Further, significant parallels exist with the INCAF publication OECD, *The State’s Legitimacy in Fragile Situations. Unpacking Complexity*, and the OECD DAC Guidelines OECD, *Supporting Statebuilding in Situations of Conflict and Fragility: Policy Guidance* (2011).

endorsement and emerged as a key reference for development agencies operating in fragile states. Like with the Fragile States Principles, to what extent donor and recipient governments will deliver on the New Deal commitments remains to be seen.³⁴³ Still, it is safe to say that both have contributed to establishing concerns about conflict and the need for legitimate institutions firmly on the mainstream development agenda.³⁴⁴ At the same time, both documents have reinforced the role that a number of deeply political questions concerning the structure and functions of the state, as well as state-society relations, assume on this agenda. Even if the broad principles and policy recommendations developed and promoted in the context of the OECD DAC have not always led to significant changes in donor practice, they have inspired strategic shifts and operational reforms of international development organizations, to which we turn now.³⁴⁵

b) Strategic Shifts and Operational Reforms of International Development Organizations

In parallel and also prior to the OECD DAC-driven elaboration of general principles for engaging with fragile states, virtually all international development organizations that operate in fragile and conflict-affected states have embarked on their own research and reform initiatives. Often supported through the establishment of dedicated policy units within the institution, many have begun to review past experiences, and adapt aid strategies, processes, and instruments to facilitate or expedite operations in fragile states. These changes serve not only the strategic

³⁴³ A first monitoring report was released in June 2014, essentially stating that progress is scattered and has to intensify. See INTERNATIONAL DIALOGUE SECRETARIAT, *International Dialogue on Peacebuilding and Statebuilding, 'New Deal Monitoring Report 2014'* (June 2014). With a critical assessment of implementation progress so far, see also JACOB HUGHES, et al., The Brookings Institution, *'Implementing the New Deal for Fragile States'* (July 2014); and FRIENT, *'Report of the FriEnt-Workshop on "A New Deal for Fragile States. International Engagement after Busan"'* (January 19, 2012), voicing the concern that donors will continue to focus on the formal institutions of the state or by-pass the state completely, in particular where the consequences of local ownership and the pace of progress in fragile states will not correspond to their preferences, or to international standards they support.

³⁴⁴ A further, more universal endorsement would be the inclusion of peace and capable institutions as stand-alone goals in the Post-2015 Development Agenda, as advocated for by the g7+. See online, <http://www.g7plus.org/news-feed/2014/9/22/high-level-side-event-completed-in-new-york-city> (accessed December 2014). With an analysis, also L. RIBEIRIO PEREIRA, Friedrich Eberst Stiftung (FES), *'What's Peace Got To Do With It? Advocating Peace in the Post-2015 Sustainable Development Agenda'* (September 2014).

³⁴⁵ On the still significant gap between policy and practice, BARANYI & DESROSIERS, 'Development Cooperation in Fragile States: Filling or Perpetuating Gaps?', 452; ALINA ROCHA MENOCAL, 'Aid in Fragile States', in David Chandler & Timothy Sisk (eds), *Routledge Handbook on International Statebuilding* (Routledge, 2013), 393.

alignment with state-building objectives, such as those agreed between donors and recipients in the New Deal. Changes also concern operational development cooperation: for instance, regarding the allocation of resources, requirements for project approval, or the role accorded to recipient governments in planning and implementation.

In the following section, I provide an overview of strategic shifts and operational reforms undertaken by international organizations that belong to the largest contributors of ODA to fragile states. According to OECD DAC statistics, in 2011, fragile states received the largest share of multilateral aid from the EU institutions, followed by the International Development Association (part of the World Bank Group), and the African Development Fund (ADF, part of the African Development Bank).³⁴⁶ Other important donors with a development mandate include the Asian Development Bank and UNDP.³⁴⁷ Similar to other countries, the largest percentage of ODA to fragile states is still provided in the form of bilateral aid.³⁴⁸ The share of multilateral aid, however, is significantly higher in fragile states than in non-fragile states (50% over 37%).³⁴⁹ Accordingly, international development organizations assume a particularly important role as resource providers in fragile states, including through catalyzing aid from more risk-averse, bilateral donors. Moreover, they are central actors in developing, promoting, and implementing a differentiated approach to development cooperation with fragile states.

i. World Bank

The World Bank has always been at the forefront of the international efforts to enhance development cooperation with fragile states.³⁵⁰ Specific attention to the challenges of states with weak policies, institutions, and governance in the

³⁴⁶ OECD, 'Fragile States 2014. Domestic Revenue Mobilization in Fragile States', p. 93, Figure A.4 (providers of development co-operation to fragile states (total ODA, 2011).

³⁴⁷ ADB was the fifth largest contributor of multilateral ODA in 2010, but its contributions significantly reduced in 2011. Besides, the International Monetary Fund (IMF), which is mandated to promote international monetary cooperation, supports fragile states through certain concessional funds, and a number of UN agencies, particularly UNRWA, UNICEF, WFP, provide humanitarian aid to fragile states.

³⁴⁸ The first by far in the OECD's ranking that includes bilateral as well as multilateral donors are the United States, with a contribution of USD 13.291 Million. *Supra* note 346.

³⁴⁹ OECD, 'Fragile States 2014. Domestic Revenue Mobilization in Fragile States', p. 32. It is also notable that while half of all ODA is usually implemented through governments (donor, recipient, or third country), in fragile states, only around 35% is delivered that way, which is partly owed to the fact that a large proportion of ODA that fragile states receive is humanitarian aid, delivered by UN agencies.

³⁵⁰ For a detailed analysis of the World Bank's engagement with fragile states, see *infra* chapter IV.

development community commenced with the World Bank's establishment of a taskforce on "Low Income Countries Under Stress" (LICUS) in 2001.³⁵¹ The LICUS initiative was initially intended to improve the effectiveness of the Bank's operations in weak capacity environments, but soon began focusing more prominently on peace- and state-building.³⁵² To acknowledge that peace- and state-building are in fact complementary processes, the World Bank subsequently consolidated its approach to conflict-affected and fragile states, and created a State- and Peace-Building Fund (SPF) in 2008.³⁵³ Since then, the organization has produced a lot of influential research, and contributed to a dynamic standard-setting process concerning fragile states in the context of the OECD DAC – most recently as an active participant of the New Deal process.³⁵⁴ Being the third largest provider of all ODA to fragile states, the World Bank has also sought to enhance its own work in weak-capacity and conflict-affected environments, by modifying rules and procedures that concern the planning, management, and implementation of development cooperation.³⁵⁵

We return to a detailed analysis of the World Bank's engagement with fragile states, which also reveals that it started well before the establishment of the LICUS taskforce in 2001, and its scope goes far beyond what the use of the fragile states terminology suggests.³⁵⁶ At this point, I focus on a preliminary highlight of the World Bank's engagement with fragile states, the publication and subsequent

³⁵¹ See also *supra* chapter I.2 b). The research findings and policy implications of the LICUS taskforce were later taken up and elaborated by the OECD DAC, as well as by the UN and various bilateral donors, most notably the UK Department for International Development.

³⁵² The LICUS approach was set out in 2002 LICUS Task Force Report, the 2003 LICUS Implementation Overview, and the 2005 Low-Income Countries Under Stress Update. The LICUS initiative ran from June 2002 to December 2007, when the Bank adopted the fragile states terminology. During that time, the Bank adopted, for instance, the THE WORLD BANK, 'Good Practice Note for Development Policy Lending. Development Policy Operations and Program Conditionality in Fragile States'. To make additional grants available to countries that would otherwise have limited or no involvement, the Bank established the LICUS Implementation Trust Fund with Resolution 2004- 0001, adopted on January 15, 2004.

³⁵³ The Bank therefore merged its to units working on conflict and fragility in a new Fragile and Conflict-Affected Countries Group (OPCFC). The SPF was established by a Resolution of March 25, 2008 (IDA/R2008-43149). See also OPCS, Establishment of a State- and Peace-Building Fund (March 25, 2008).

³⁵⁴ For instance, the categorization of different fragile states developed by the World Bank's LICUS task force is reproduced almost literally in the first of the OECD's Fragile States Principles (*supra* note 144). The Principles were agreed following a process led by the World Bank and DFID as co-chairs of the OECD DAC's Fragile States Group. On the role of the Bank in promoting and applying the concept of fragile states, see also NAY, 'International Organisations and the Production of Hegemonic Knowledge: How the World Bank and the OECD helped invent the Fragile State Concept'.

³⁵⁵ The IDA provided USD 4.613 Million to fragile states in 2010, only slightly less than the EU institutions with USD 5.041 Million. See *supra* note 346.

³⁵⁶ The World Bank adopted the "fragile states" terminology as of fiscal year 2008. Development Committee Communiqué, Washington, DC, April 13, 2008, para 6. In detail, see *infra* chapter IV.

operationalization of the World Development Report (WDR) on “Conflict, Security, and Development” in 2011.³⁵⁷

The WDR constitutes the analytical backbone and centerpiece of the World Bank’s approach, and calls for nothing less than a paradigm shift in development cooperation with fragile states. It finds that the legacy of violence, weak institutions and other challenges plaguing fragile states cannot be resolved by short-term or partial solutions, and by operating on the basis of rules and procedures that were originally developed for more stable and high-capacity countries. Accordingly, a new approach to guide the Bank’s work in these settings should accept the links between security and development outcomes; balance the risk of action with the risk of inaction; adapt requirements to the conditions found in fragile states; and ultimately, expect a degree of failure in weak capacity, high risk environments.

Fuelled by the insights of the WDR, the organization has embarked on a major reform effort that affect virtually all areas of its work: from pushing new frontiers in terms of security-sector involvement, to re-allocating resources, adapting aid instruments, reforming human resource policies, and improving inter-agency relations.³⁵⁸ The reform program is set out in a staff paper on operationalizing the WDR 2011, which calls on the Bank “to significantly adjust its operations model while remaining within its established mandate”.³⁵⁹ Moreover, the conviction that fragile states require special support and a differentiated approach has received the highest-level endorsement at IDA’s sixteenth Replenishment meeting. At the meeting held in March 2011, the Executive Directors tasked the organization with rethinking its business models in fragile states, and reforming its legal and policy framework

³⁵⁷ THE WORLD BANK, *World Development Report: Conflict, Security, and Development*. The World Development Report is the World Bank’s annual flagship publication. The WDR 2011 was prepared by a team of World Bank researchers over a period of two years, which involved many exchanges with government representatives and national stakeholders in developing and donor countries, as well as other international organizations, in particular the UN as the organization traditionally responsible for political and security-related forms of cooperation.

³⁵⁸ At the institutional side, the World Bank launched a Global Center on Conflict, Security, and Development (CCSD) in 2012, to provide support to staff working in fragile states, and design and advocate for more flexible and responsive operational policies and practices.

³⁵⁹ The World Bank, Operationalizing the 2011 World Development Report: Conflict, Security, and Development, DC2011-0003 (April 4, 2011), p. iii. Further reform proposals were made by the IEG in its 2013 review of the Bank’s engagement in fragile states. See INDEPENDENT EVALUATION GROUP, *World Bank Assistance to Low-Income Fragile- and Conflict Affected States*, recommending, for instance, the development of a more suitable classification of fragile states. The response of Management to the IEG findings is available online: https://ieg.worldbankgroup.org/Data/reports/chapters/fcs_man_response.pdf (accessed December 2014).

accordingly.³⁶⁰ Fragile states have moved from the margins to the mainstream of the World Bank.

The operationalization of the WDR further illustrates how mutual influences between different institutions foster a shared understanding of state fragility, and contribute to a gradually more consistent approach to engaging with fragile states. The report largely reflects and concentrates the findings of earlier publications not just of the World Bank, but in particular of the OECD DAC, and was drafted in close collaboration particularly with the UN.³⁶¹ In turn, the report's recommendations – and how the Bank defines and addresses state fragility more generally – have not only influenced high-level policy making at the OECD DAC, but also the strategies and approaches of other bilateral and multilateral donor organizations.³⁶² This influence becomes most apparent with regards to other MDBs, which often look to the World Bank when considering new policies.

ii. African Development Bank

The African Development Bank has been very active in operationalizing a differentiated approach to fragile states.³⁶³ Given that a large majority of states considered as fragile are currently located in Sub-Saharan Africa, accounting for more than a third of AfDB member countries, this comes as no surprise.³⁶⁴ Like the World Bank, the AfDB keeps a list of fragile states, which includes countries with particularly weak policies and institutions, or the presence of a UN peace operation within the past three years.³⁶⁵

³⁶⁰ THE WORLD BANK, *'Additions to IDA Resources: Sixteenth Replenishment - IDA 16: Delivering Development Results'* (2011), paras. 84-92. A signal that the Bank's focus will remain on fragile states is the increase by over 50% of IDA's resources made available to fragile states in the period from 2014-2017. THE WORLD BANK, *'Additions to IDA Resources: Seventeenth Replenishment - IDA17: Maximizing Development Impact'* (March 25, 2014).

³⁶¹ See only the bibliography of the 2011 World Development Report, which refers to 22 OECD documents and publications; more specifically, see BARANYI & DESROSIERS, 'Development Cooperation in Fragile States: Filling or Perpetuating Gaps?', 449-451, arguing that the WDR's open concern with legitimate institutions and "politics of transformation" would not have been possible without earlier OECD publications focusing on fostering state legitimacy and state-society relations in fragile states.

³⁶² On mutual influences, see also *supra* note 354.

³⁶³ For a more detailed analysis of the AfDB's engagement with fragile states in comparison with other development organizations, see *infra* chapter V.1.

³⁶⁴ Besides, DFID appears to have played a significant role in supporting a more active engagement of the AfDB with fragile states. See DFID's Annual Report 2008, stating that has "secured key commitments" from the AfDB as well as the World Bank, as part of the negotiations on the replenishments of the respective organizations (at paras. 8.7 and 8.6).

³⁶⁵ The quality of institutional arrangements and governance is assessed in the AfDB's Country Policy and Institutional Assessment (CPIA). All countries that score low on the CPIA are automatically

AfDB's development of a more explicit and systematic approach to fragile states began with a focus on the specific constraints and needs of post-conflict countries, encapsulated in the 2001 Post-Conflict Assistance Policy Guidelines and the creation of a Post-Conflict Facility in 2004. In 2008, following the adoption of the OECD Fragile States Principles, the Board of Directors formally approved a "Strategy for Enhanced Engagement in Fragile States".³⁶⁶ Now explicitly focused on fragile states, the Strategy outlines the basic parameters of a differentiated approach to planning and implementing projects in these settings. It should include the adaptation of AfDB's business processes and procedures to allow for more flexibility in responding to different country contexts, namely to situations of severely degraded institutional and administrative capacity.³⁶⁷ The Strategy is considered binding on the organization's staff, which have to follow the strategic orientation and concrete actions set out therein. The Strategy's implementation is monitored against a set of indicators, and Management has to report on progress made to the Board of Executive Directors.³⁶⁸

Further, AfDB's growing concern with the special needs of fragile states went along with the allocation of significant, additional resources to these countries. Also in 2008, the AfDB established a Fragile States Facility (FSF) in order to provide financial and technical assistance specifically targeted at building state capacity and accountability in fragile states.³⁶⁹ In financial and operational terms, the FSF is largely autonomous and operates with its own rules and procedures, for instance permitting funds to be disbursed directly to non-state actors.³⁷⁰ At the institutional level, a Fragile States Unit (later renamed in Transition Support Unit) is tasked with the implementation of the Strategy and the administration of the FSF.

classified as fragile states. Since 2007, the World Bank, the AfDB and the ADB use a harmonized average of their individual CPIA processes and rankings to classify fragile states.

³⁶⁶ AFRICAN DEVELOPMENT FUND, '*Strategy for Enhanced Engagement in Fragile States*'. The Strategy states that "fragile state circumstances take different forms in different countries and in the same country at different times" (para. 2.1), and hence chooses a continuum approach rather than a clear-cut definition of fragile states (Figure I). In contrast, the classification on the basis of the CPIA has a clear cut-off. *Supra* note 366.

³⁶⁷ *Ibid.*, Part 8.

³⁶⁸ *Ibid.* paras. 9.2 and 9.3. Implementation of the Strategy was subject to an independent review in 2012, the OPERATIONS EVALUATION DEPARTMENT, African Development Bank, '*Evaluation of the Assistance of the African Development Bank to Fragile States*' (2012), vii, which finds that the ambitious vision articulated in the 2008 Strategy had not been accompanied by the organizational changes and institutional commitments required to make it reality.

³⁶⁹ The FSF was created by means of a Resolution of the Executive Directors, B/BD/2008/05-F/BD/2008/03, adopted on 28 March 2008. Criteria, decision-making process and implementation arrangements for grants under the FSF are set out in the AfDB Operations Guidelines of the Fragile States Facility (hereinafter FSF Operations Guidelines).

³⁷⁰ For an analysis of the particularities of the FSF, see *infra* chapter V.1 b).

The AfDB is thus strongly committed to using a differentiated approach when engaging with fragile states – in line with the OECD DAC’s Fragile States Principles, and adhering to the New Deal. As the formal adoption of a Fragile States Strategy and creation of a legally autonomous financing instrument suggest, such an approach is already being implemented in the AfDB’s legal and policy framework.³⁷¹ This trend is likely to continue: to support its claim to become a leader on issues of state fragility in Africa, the AfDB has adopted a new Fragile States Strategy for 2014-2019.³⁷² The Bank-wide Strategy provides authoritative guidance on how to change the way AfDB engages in fragile states, and adapt policies and processes to the specific circumstances and needs of countries in a “condition of elevated risk of institutional breakdown, societal collapse or violent conflict.”³⁷³

iii. Asian Development Bank

The Asian Development Bank, too, acknowledges that “policies, principles, and operational approaches that development agencies normally apply” are inadequate and require adaptation in fragile states.³⁷⁴ Based on a CPIA-based classification process largely similar to that of the World Bank and the AfDB, approximately a third of ADB’s low-income member countries were considered fragile or conflict-affected in 2012.³⁷⁵ These include post-conflict countries like Afghanistan and East Timor, as well as a number of particularly vulnerable, small island states.

Following the adoption of the OECD’s Fragile States Principles in 2007, the ADB reviewed its own operations in fragile states accordingly, and drafted a policy paper that sets out its “Approach to Engaging in Weakly Performing Countries”.³⁷⁶ In

³⁷¹ In detail, see *infra* chapter V.1.

³⁷² AFRICAN DEVELOPMENT BANK, *Addressing Fragility and Building Resilience in Africa: The African Development Bank Group Strategy 2014–2019* (June 2014), which will be supplemented by revised Operational Guidelines for the FSF. Moreover, fragile states remain a core focus area under the African Development Fund’s Thirteenth Replenishment Report, which determines the organization’s financial envelope and strategic priorities until 2016. ADF 13 Report, Supporting Africa’s Transformation (March 12, 2014).

³⁷³ *Ibid.*, Annex 1: Fragility, its drivers and manifestations, para. 1.

³⁷⁴ ASIAN DEVELOPMENT BANK, *Working Differently in Fragile and Conflict-affected Situations - The ADB Experience: A Staff Handbook* (2012), 1. For a more detailed analysis of the ADB’s engagement with fragile states in comparison with other development organizations, see *infra* chapter V.1.

³⁷⁵ See ASIAN DEVELOPMENT BANK, *Annual Report on the 2012 Country Performance Assessment Exercise* (April 2013). The ADB has committed to align its fragile states classification methodology with that of the World Bank and AfDB.

³⁷⁶ ASIAN DEVELOPMENT BANK, *Achieving Development Effectiveness in Weakly Performing Countries. The Asian Development Bank’s Approach to Engaging with Weakly Performing Countries* (April 2007). The ADB first became concerned with “weakly performing countries” in 2004, when it

essence, the paper recommends that ADB responds to the capacity constraints of government counterparts in fragile states by focusing on realistic objectives, while relaxing certain requirements for project approval and implementation in order to allow for more rapid engagement. Though not formally binding, the approach laid out in the paper has since proven influential in guiding ADB's internal processes and interactions with fragile states.³⁷⁷

ADB's focus on fragile states has further intensified in line with the political momentum that has been gathering after the publication of the WDR by the World Bank in 2011, and the broad endorsement of the New Deal for fragile states in 2012 – two milestones that the ADB understands as expressions of a new international paradigm for development cooperation. In response, the organization has adopted a Staff Handbook and an Operational Plan to adjust or otherwise improve its internal processes.³⁷⁸ The Staff Handbook is an informal guide that explicitly draws on the WDR recommendations. It offers comprehensive guidance to staff on why and how to work differently in fragile states, though rather than establishing new policies or procedural requirements, it points attention to the menu of available options for operating in fragile states under existing policies.³⁷⁹ In turn, ADB's Operational Plan for fragile states has not been formally adopted, but the concrete set of actions agreed therein come with specific implementation and monitoring arrangements, including time frames, results, and indicators.³⁸⁰

The paradigm shift in engaging with fragile states for the ADB essentially consists in adopting a conflict-sensitive approach, while focusing more strongly on strengthening state capacities and working through country systems even in more

presented a paper on the subject to donors at the Asian Development Fund IX negotiations. “Weakly performing countries” correspond to what ADB now refers to as “fragile and conflict-affected situations”.

³⁷⁷ For instance, the basic tenets of the Approach are also reiterated in ADB's long-term strategic framework: ASIAN DEVELOPMENT BANK, *'Strategy 2020. The Long-term Strategic Framework of the Asian Development Bank 2008-2020'* (April 2008), pp. 17-18 and 24.

³⁷⁸ ASIAN DEVELOPMENT BANK, *'Working Differently in Fragile and Conflict-affected Situations - The ADB Experience: A Staff Handbook'* and ASIAN DEVELOPMENT BANK, *'Operational Plan for Enhancing ADB's Effectiveness in Fragile and Conflict-Affected Situations'* (April 2013) (see paras. 4 and 5 therein on an emerging new paradigm of development cooperation).

³⁷⁹ ASIAN DEVELOPMENT BANK, *'Working Differently in Fragile and Conflict-affected Situations - The ADB Experience: A Staff Handbook'*, 3.

³⁸⁰ ASIAN DEVELOPMENT BANK, *'Operational Plan for Enhancing ADB's Effectiveness in Fragile and Conflict-Affected Situations'*, Part IV and Appendix I (Results Framework for ADB's Operational Plan).

difficult settings.³⁸¹ Moreover, it entails a review of all processes and instruments of aid delivery, with the objective of making them more adapt to weak-capacity or insecure environments: for instance, by easing demanding fiduciary requirements that must be met for project approval, or by considering implementation arrangements that offer an alternative to the traditional way of working through governments in exceptional circumstances. Similar to the World Bank and the AfDB, the ADB has accordingly committed to the strategic priority of state-building, and to internal reforms of processes and financing instruments considered inappropriate in the context of conflict and fragility. Yet, as the comparative analysis in chapter V shows, the ADBs approach is less far-reaching and formalized as that of the World Bank and the AfDB.³⁸²

iv. European Union

The European Union is the second largest provider of ODA to fragile states after the US, and the largest provider of multilateral aid.³⁸³ As a supranational organization with a broad, political mandate that extends far beyond poverty reduction and development, the European Union's approach to fragile states is characteristically multi-faceted, combining political and diplomatic, security, development and humanitarian instruments.³⁸⁴ In fact, the EU became concerned with fragile states first as a security, and then as a development challenge: the 2003 European Security Strategy identifies state failure as a key threat before the 2005 European Consensus on Development formulates the commitment to more effectively address state fragility.³⁸⁵ The EU has also a specific development mandate, however, and within its

³⁸¹ Ibid., para. 6, stating that “ADB will implement a comprehensive set of actions to mainstream fragility- and conflict-sensitive approaches” and “bring the importance of statebuilding and institutional strengthening to the center stage” of its engagement with fragile states.

³⁸² *Infra* chapter V.1 and V.3.

³⁸³ *Supra* note 346. For a more detailed analysis of the EU's engagement with fragile states in comparison with other international organizations, see *infra* chapter V.2.

³⁸⁴ This is where the EU sees its main comparative advantage. For an overview of the EU policy and legal framework concerning fragile states, see EUROPEAN COMMISSION & EUROPEAN UNIVERSITY INSTITUTE, *'European Report on Development. Overcoming Fragility in Africa. Forging a New European Approach'* (2009), chapter 8.

³⁸⁵ European Security Strategy “A Secure Europe in a Better World”, Brussels, 12 December 2003, wherein state failure is defined in largely similar terms as nowadays state fragility, namely “[b]ad governance – corruption, abuse of power, weak institutions and lack of accountability - and civil conflict” (p. 4); and the Joint declaration by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on the development policy of the European Union entitled “The European Consensus” (hereinafter European Consensus on Development), OJ C 46/1 of February 24, 2006, at paras. 20-22; 89-92.

role as a multilateral donor organization, it has committed to implementing the OECD's Fragile States Principles, and modified its own policy framework and aid instruments accordingly. Although the EU has not been a driving force in the fragile states agenda and does not specifically classify and keep a list of fragile states, its legal and policy framework has thus evolved in tune with the emerging practices of other donors.³⁸⁶

To set out the analytical and conceptual grounds for the EU's response to situations of fragility, the EU first adopted a series of policy documents in 2007, including a Communication of the European Commission and Conclusions of the Council of the European Union.³⁸⁷ Both documents identify building the capacities of state institutions, as well as strengthening state-society relations and democratic governance, as key objectives in fragile states. Major importance is also accorded to enhancing coordination and policy coherence when engaging with fragile states, namely between the EU's Common Foreign and Security Policy (CFSP), humanitarian assistance, and development cooperation.³⁸⁸ In 2009, the first European Report on Development was dedicated to "Overcoming Fragility in Africa". The Report proposed to reform the EU's current policy framework for engaging in fragile states, for instance, by qualifying the principle of ownership in fragile states, and according a greater role to non-state actors in cooperation.³⁸⁹ The "Agenda for Change", a policy statement and reform plan presented by the EU Commission in 2011 to increase the impact of EU development aid, too, calls for "differentiated development partnerships", specific forms of support, and greater flexibility when dealing with fragile states.³⁹⁰ Moreover, the EU's "Comprehensive Approach to

³⁸⁶ See MARKUS FURNESS, German Development Institute, Discussion Paper 5/2014, *'Let's Get Comprehensive. European Union Engagement in Fragile and Conflict-Affected Countries'* (2014), 7, describing the EU "as a 'norm taker' rather than a 'norm maker' with regard to its engagement with FCA [fragile and conflict-affected] countries".

³⁸⁷ Communication from the Commission, Towards an EU Response to Situations of Fragility – Engaging in Difficult Environments for Sustainable Development, Stability and Peace, Brussels, 25.10.2007, COM(2007) 643; and Council Conclusions on a EU Response to Situations of Fragility, 2831st External Relations Council meeting in Brussels, 19-20 November 2007.

³⁸⁸ See the Council Conclusions on Security and Development, adopted at the 2831st External Relations Council meeting in Brussels, 19-20 November 2007, para. 2, determining that "the nexus between security and development should inform EU strategies and policies in order to contribute to the coherence of EU external action".

³⁸⁹ EUROPEAN COMMISSION & EUROPEAN UNIVERSITY INSTITUTE, *'European Report on Development. Overcoming Fragility in Africa. Forging a New European Approach'*, 4.

³⁹⁰ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Increasing the Impact of EU Development Policy: An Agenda for Change, Brussels, 13. October 2011, COM(2011) 637 final, at p. 9-10.

External Conflicts and Crisis” of 2013 establishes a set of concrete measures and processes to enhance the coherence, effectiveness, and speed of the EU’s response specifically in fragile and conflict-affected countries.³⁹¹

In parallel, the EU has begun to reform some of its aid instruments and procedures, with the aim of making them more adapt to situations of conflict and fragility. For instance, the Instrument for Stability (IfS) was created in 2007 specifically to enable the EU to provide timely financial support to countries in situations of crisis or emerging crisis.³⁹² Both at the level of general principles and concrete rules, the EU’s reforms have also concerned its legal framework for development cooperation, consisting of the Cotonou Agreement for ACP states, and the Regulation establishing a financing instrument for development cooperation (DCI Regulation) for non-ACP states. A detailed analysis of these binding legal sources follows in chapter V.

v. United Nations Development Programme

A central actor is still missing in the overview: the UN. The UN’s main programme responsible for development cooperation is the United Nations Development Programme (UNDP), which also leads the United Nations Development Group (UNDG), consisting of 32 UN programmes and funds, departments and offices, as well as UN specialized agencies that all play a role in development cooperation. For a meaningful account of the UN’s approach to development cooperation with fragile states, we would thus need to consider a plethora of institutions with different legal status and mandates, which exceeds the scope of this thesis.³⁹³ Nonetheless, at

³⁹¹ Joint Communication of the European Parliament and the Council, The EU’s Comprehensive Approach to External Conflict and Crises, Brussels, December 11, 2013, JOIN(2013) 30 final.

³⁹² Regulation (EC) No 1717/2006 of the European Parliament and of the Council of November 15, 2006 establishing an Instrument for Stability (OJ L 327/1), hereinafter IfS Regulation.

³⁹³ There are a number of additional reasons why I do not include just UNDP in my comparative analysis of different international development organizations. First of all, UNDP is no international organizations, but a programme established by UN-General Assembly Resolution 2020 (XX) of 22 November 1965, which reports to the General Assembly. For the same reason, it is nearly impossible to consider UNDP’s policies and procedures concerning development cooperation with fragile states independent of broader UN policies and procedures. In addition, from a methodological perspective, UNDP’s legal and policy framework is less comprehensive, less formalized, and ultimately less transparent than those of the MDBs or the EU, making it considerably more difficult to analyze how it has been adapted vis-à-vis fragile states. On the specific characteristics of UNDP as a donor agency, see PHILIPP DANN, ‘Grundfragen eines Entwicklungsverwaltungsrechts’, in Christoph Möllers, et al. (eds), *Internationales Verwaltungsrecht: Eine Analyse Anhand von Referenzgebieten* (Mohr Siebeck, 2007); and on UNDP’s evolution, mandate, and modes of operation in general, CRAIG N. MURPHY, *The United Nations Development Programme: A Better Way?* (Cambridge University Press 2009).

least a quick look at UNDP is necessary to complement our preliminary overview of strategic and operational reforms.

UNDP has long been engaged in many fragile and conflict-affected states, which have gradually come to account for a dominant part of its programming activity.³⁹⁴ Unlike other international development organizations, UNDP generally refrains from using the fragile states terminology to label challenges associated with weak institutions, poor governance, conflict, or the breakdown of effective government in developing countries.³⁹⁵ Rather, its engagement with fragile states forms part of a broader agenda of addressing crisis in developing countries, whether caused by conflict, disaster, or other. Nonetheless, UNDP's efforts to improve the work on "crisis prevention and recovery" show similarities with those of other development organizations focused on conflict and fragility.

Already in 2000, UNDP established a quick-disbursing and flexible tool to more effectively respond to the fluid circumstances and urgent needs of crisis-affected countries, the Thematic Trust Fund for Crisis Prevention and Recovery. In 2001, the Bureau for Crisis Prevention and Recovery (BCPR) was set up to manage the Fund, and to lead UNDP's expanding work on post-conflict development. The BCPR is since responsible for mainstreaming peace-building objectives throughout all operations, and concentrates UNDP's efforts of building effective and responsive state institutions, restoring democratic processes, and strengthening justice and security systems.

The focus on peace- and state-building objectives so strongly advocated in the Fragile States Principles and the New Deal is hence not new to UNDP. In fact, with its core competency in areas like security, justice, and rule of law reforms, UNDP often implements development projects and programs in fragile states that are financed by the EU and the World Bank. In recent years, all three organizations have

³⁹⁴ Since 1996, UNDP has committed to fund crisis prevention and recovery activities by setting aside a part of its budget towards a specific, rapid and flexible financing. Moreover, UNDP was the official partner of the World Bank in the implementation of the LICUS initiative in Africa, for instance in Somalia. For an overview of UNDP's early engagement, see also BRUCE D. JONES, 'The Changing Role of UN Political and Development Actors in Situations of Protracted Crisis', in HARMER & MACRAE, *'Beyond the Continuum. The Changing Role of Aid Policy in Protracted Crises'*; or BRUCE JONES & BEN TORTOLANI, New York University, Center on International Cooperation, *'Deep Dive on Fragile States'* (August 2013), 3-5.

³⁹⁵ In later publications, UNDP starts referring to 'fragility', 'fragile situations', and 'fragile settings'. E.g. ROBERT MUGGAH, et al., UNDP, *'Governance for Peace. Securing the Social Contract'* (2012). Fragility is therein defined not as a characteristic of states, but rather with reference to specific circumstances like armed conflict, or chronic violence (p. 19).

concluded formal agreements to facilitate such inter-organizational cooperation.³⁹⁶ The fact that UNDP's own financial contributions to fragile states are comparatively minor is thus deceiving – it has an operational presence in more fragile states than the World Bank.³⁹⁷ Moreover, to strengthen operations in conflict-affected and fragile states, UNDP has adopted a long-term strategy of “resilience-building”,³⁹⁸ and developed specific “fast track policies and procedures” to get there.³⁹⁹

In turn, UNDP's importance in contributing to general policy-making and standard-setting concerning fragile states is reflected in the fact that it has been chairing the OECD's INCAF for many years, and is an active participant of the New Deal processes, which it supports through a dedicated funding facility to enable quick and flexible support.⁴⁰⁰ Finally, UNDP significantly contributes to shaping new ways of dealing with fragile states in the context of the Post-2015 development agenda that succeeds the Millennium Development Goals, and will likely include specific state- and peace-building objectives.⁴⁰¹

vi. Summary and Disclaimer

In this section, I provided an overview of how different international development organizations have sought to address some of the challenges they associate with operating in fragile states. I showed that the majority have developed strategies for engaging with fragile states, which essentially reorient their activities towards establishing, reforming, or strengthening state institutions. Moreover, several organizations have set out to develop and implement a differentiated approach to the

³⁹⁶ With the World Bank, the UN has established a United Nations-World Bank Partnership Framework for Crisis and Post-Crisis Situations in 2008. In 2009, several UN agencies concluded a Fiduciary Principles Accord with the World Bank to facilitate cooperation and avoid implementation delays caused by competing fiduciary requirements. With the EU, UNDP collaborates through a special partnership on crisis prevention and recovery since 2003, whereby both institutions engage in a regular dialogue, share best practices and jointly develop operational guidance. Almost half of the EU's funding to UNDP in 2011 was to support its work on crisis prevention and recovery.

³⁹⁷ UNDP's financial contributions to fragile states amount to merely 5% of the EU's (*supra* note 346). For a comparison of UNDP's and the World Bank's involvement in fragile states, see JONES & TORTOLANI, 'Deep Dive on Fragile States', 5.

³⁹⁸ UNDP, 'Changing With the World. UNDP Strategic Plan 2014-2017' (2014), 34-37. In development speak, resilience constitutes the opposite of fragility. See also THE WORLD BANK, 'World Development Report: Conflict, Security, and Development'.

³⁹⁹ UNDP Fast Track Policies and Procedures, available online:

<https://info.undp.org/global/popp/ft/Pages/Fast-Track.aspx> (accessed November 2014). For instance, Fast Track Policies enable more flexible recruitment and procurement in situations of crisis, and therefore include specific procedures, triggers and accountability mechanisms.

⁴⁰⁰ On UNDP actions to implement the New Deal, see the monitoring report published by the International Dialogue's Secretariat (*supra* note 343).

⁴⁰¹ See UNITED NATIONS, 'A New Global Partnership. Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda' (2013); and *supra* note 344.

design, management, and delivery of aid in fragile states, often supported by the use of specific financing instruments and more flexible procedures. Abstract principles and high-level political commitments emerging from the context of the OECD DAC are thus concretized and operationalized by international organizations with an often significant part of their operations in fragile states. These developments are reinforced through mutual exchange, efforts at harmonization, and enhanced cooperation between organizations, for instance regarding the use of similar classification schemas.⁴⁰²

These observations are still preliminary. They are based on a cursory overview of policy-making and reform initiatives of selected organizations, and they refer to processes that are still ongoing. Many organizations have begun focusing on the particular development challenges of countries emerging from conflict or caught in protracted crisis since the early 1990s. It is only in the last decade, however, that this concentration has entailed an unprecedented surge of reforms across organizations, which is new and noteworthy. The rapid spread of the “fragile states” terminology in development discourse and practice since mid-2000 may reflect this trajectory. However, efforts to reconsider unrealistic assumptions and adjust policies, procedures, and aid instruments in the context of states with ineffective government do not always explicitly address “fragile states”. Such efforts neither begin, nor end, with the increasing use of this terminology, which marks just the tip of the iceberg.

A more thorough analysis is hence required to get to a comprehensive understanding of how, and to what effect individual organizations engage with fragile states, as well as to identify possible (in)consistencies in the approaches chosen. Such an analysis needs to account for specific mandates, membership structure, or institutional culture – factors that influence not only how to respond, but also why. For now, it is sufficient to note that the understanding of fragile states constituting a unique challenge for development cooperation is increasingly shared, and translates into an emerging consensus on the need for a differentiated approach. To different extents and through various means, all international development organizations have

⁴⁰² An obvious example is the Report of the MDB Working Group, Towards a More Harmonized Approach to MDB Engagement in Fragile Situations, adopted in 2007, wherein the heads of the AfDB, ADB, the Islamic Development Bank, the Inter-American Development Bank, the European Bank for Reconstruction and Development, the World Bank and the IMF agree to develop common definitions and operating principles, and effective and participatory procedures. On cooperation between the UN, the World Bank, and the EU on issues of conflict and fragility, see also *supra* note 397.

therefore begun to revisit development objectives, processes, and instruments when engaging with fragile states.

4. Conclusion

This chapter provided a *tour d'horizon* of the evolving engagement of international development organizations with fragile states. I started from the observation that the notion of fragile states, through its constant reiteration, quantification, and ultimately operationalizing in international development discourse and practice, has become a basis for action. International organizations assume a prominent role in this process. Operating on the basis of a state-centric development paradigm, they normally expect to find an effective government in recipient countries, both in a formal, juridical sense, and in terms of basic capacities. Seeking to address the various challenges – legal, political, technical – that complicate engagement in weak-capacity, politically unstable environments, development organizations contribute to general standard-setting and policy-making, and develop and implement differentiated approaches to the design, management, and delivery of ODA vis-à-vis fragile states. Not least since such processes are becoming more systematic and coherent within and across different organizations, they begin to yield certain patterns. Broadly speaking, development cooperation becomes more focused on the strategic objective of state-building, while aid processes and instruments are being adapted to account for the limited capacity of government counterparts.

I have indicated some of the implications of this development policy shift before: the overall volume and share of aid to fragile and conflict-affected states has increased considerably, with activities in the realm of institution-building and good governance reforms receiving a larger portion of available resources.⁴⁰³ The increasing entanglement of development and security-related objectives has provided the grounds for development organizations to gradually expand their mandate and field of engagement into the realm of peace- and state-building.⁴⁰⁴ Apart from getting

⁴⁰³ See *supra* chapter II.1.

⁴⁰⁴ This entanglement is often viewed critically, as political and security actors may in turn seek to influence the means and ends of development cooperation, particularly in countries considered of strategic importance. E.g. BOON, "'Open for Business': International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law"; or EVA NIEUWENHUYIS, 'Development Aid by Tank Viewed in the Light of the Globalisation of the Western Development Model', in Bruce Currie-Alder,

involved in often highly politicized contexts of conflict, or alongside humanitarian actors in complex emergencies, development organizations have become more concerned with deeply political subject matters, such as fostering inclusive political settlements, or constructive state-society relations.

In turn, how development organizations plan, manage, and deliver ODA in fragile states can have significant implications for the states concerned, and for their populations. Fragile states are typically among the most aid-dependent countries: not only the economy, but also the functioning of the bureaucratic apparatus and the ability of state institutions to deliver basic services rely on steady, incoming resource flows in the form of ODA. Accordingly, upon what terms and conditions international organizations decide to engage or disengage, to increase, suspend or terminate development funding is likely to have considerable material implications for governments, and have important humanitarian implications for an already vulnerable population. Even where a government is not so much materially dependent on aid, whether development organizations engage with a country, and through what forms and channels of aid more particularly, can send important political messages.⁴⁰⁵ Such decisions are regularly seen to reflect whether donors deem a government as reliable or legitimate counterpart, an implicit endorsement that becomes especially relevant where the legal status of a state or a government's claim to power are in doubt.⁴⁰⁶

In light of the conceptual weaknesses and ambiguities of the fragile states agenda, as well as the potentially significant implications just outlined, it becomes even more important to scrutinize how it is operationalized and ultimately formalized in multilateral development cooperation. The preceding overview of policy-making and standard-setting, strategic shifts and operational reforms concerning fragile states suggested that development objectives, processes and instruments are increasingly modified vis-à-vis fragile states. Objectives, processes, and instruments, however, are in turn informed by rules and procedures, which determine for what purposes and

et al. (eds), *International Development. Ideas, Experience, and Prospects* (Oxford University Press, 2014).

⁴⁰⁵ MACRAE, et al., 'Aid to 'Poorly Performing' Countries: A Critical Review of Debates and Issues', at 44; also BOON, "'Open for Business': International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law'.

⁴⁰⁶ See MACRAE, et al., 'Aid to 'Poorly Performing' Countries: A Critical Review of Debates and Issues', at 44, arguing that there is "a link between aid, the capacity of political authorities to govern and claims to juridical status." Further, the authors suggest that bilateral donors are likely to be influenced in their decision on the initiation or continuation of aid flows by broader, political considerations concerning the desired status of a state or territory, and that they moreover exert influence on international development organizations in this regard.

how aid is designed, managed, and delivered. Ultimately, how international organizations assess the “type and quality of statehood” can therefore affect not just the scope and content of aid, but also the way it is governed – and what roles and responsibilities are accorded to recipient governments in the process.⁴⁰⁷ To grasp how the evolving engagement of international development organizations with fragile states may hence be legally significant, I provide a brief interlude on the legal nature of rules and substance of analysis in the following chapter.

⁴⁰⁷ Ibid., 41, highlighting the powerful role of donors in analyzing “the type and quality of statehood”, and thus deciding on the volume of aid, the form of aid, and the channels through which it is delivered.

III. The Law of Development Cooperation – Interlude on the Nature of Rules and Substance of Analysis

A certain supposition has inspired and informed the preceding elaborations: that the phenomenon of fragile states perhaps deserves more attention from legal scholarship than suggested by the fact that it is not easily amenable to a juridical translation. Fragile state is no legal term or concept, but this does not mean that how they are dealt with is necessarily beyond law. By shifting the focus away from the question what fragile states are, to the question what role they are accorded by other legal subjects, using different legal instruments, we may learn more about the actual significance of state fragility from the perspective of international law.

Multilateral development cooperation already proved to be a fruitful field for analysis in this regard. International development organizations generally assume the existence of effective government counterparts in recipient countries, an assumption that may turn out fictitious and hence could stand in the way of assisting fragile states and their populations. Therefore, they have sought ways of working more effectively in weak-capacity, politically unstable environments, and of overcoming a variety of legal and operational constraints that often complicate engagement in such settings. Interestingly, we have seen that international organizations have not always settled for responding *ad hoc*, on a case-by-case basis. Instead, many organizations have apparently decided on a more systematic and consolidated approach. They have sought to modify rules and procedures that guide the transfer of ODA, and determine the roles and responsibilities of fragile states in the process.

The previous chapter has thus provided preliminary evidence to support the assumption that fragile states may be a phenomenon beyond law, but the evolving response of international development organizations is not. Yet, it has also shown that a much more thorough and well-grounded investigation is needed to understand how, and to what effect international development organizations adapt their legal and policy frameworks vis-à-vis fragile states. In fact, approaching these questions first requires a basic understanding of the sources, legal nature, and effects of rules that inform the objectives, processes and instruments of multilateral development cooperation. As noted before, the law of development cooperation is a field of law that has long escaped the attention of legal scholars, which is due in part to its relative informality, or more precisely, the combination of traditional sources of international

law and some more informal sources. With a view to multilateral development cooperation, it is safe to say that not all, or perhaps not even most of the strategies, policies, and guidelines that international organizations produce to guide operations in fragile states are legally significant, let alone formally binding. The expanding scope and depth of international regulation and the evolving role of international organizations as “law-makers”, however, demands consideration of practices and instruments of governance that do not fit neatly with established categories and sources of international law.⁴⁰⁸ With a clearer understanding of the (more and less formal) rules that guide how international organizations plan, manage, and implement development cooperation, it is also possible to discern the potential legal significance of their adaptation vis-à-vis fragile states.

Further, to grasp the outcome of such adaptations and make out how development cooperation with fragile states differs from that with other countries, it is necessary to determine a baseline: the basic, normative ideas that guide how international organizations normally plan, manage, and implement aid. The legal and policy frameworks of international organizations engaged in development cooperation have a number of very similar rules, concerning their objectives and purposes, how they usually carry out functions, and how they deal with recipient countries. For instance, all organizations are naturally mandated to foster development. We have also seen that international organizations operate on the basis of a state-centric paradigm, and are often explicitly required to respect the sovereignty of recipient states. Drawing from the legal and policy frameworks of various international organizations engaged in development cooperation, it is hence possible to identify a number of basic ideas that all have in common. In that they capture regularities in different legal and policy frameworks, these basic ideas help to structure a diversity of rules – and ultimately, to assert the broader effects of how international organizations adapt rules vis-à-vis fragile states.

This chapter accordingly sets the grounds and provides the necessary tools for examining how, and to what effect international organizations adapt rules that govern the transfer of ODA vis-à-vis fragile states. I begin by analyzing the nature of rules that govern how international organizations provide ODA, with a particular focus on the legal effects and potential significance of internal, secondary rules (III.1). Turning

⁴⁰⁸ ALVAREZ, *International Organizations as Law-Makers*.

from legal nature to substance, I draw on the legal frameworks of international organizations engaged in development cooperation to outline basic, normative ideas that generally guide their conduct – and which can serve as a baseline to analyze legal adaptations vis-à-vis fragile states. (III.2). I conclude by highlighting the inherent restrictions, but also the significant value that a legal perspective can bring to the study of how international organizations engage in development cooperation with fragile states (III.3).

1. The Law of Development Cooperation as a Law of International Development Organizations – On the Legal Nature and Effect of its Rules

Development cooperation is not only subject to technical considerations and political decision-making. It is increasingly guided by rules. At the international, supranational, and national level, a diverse set of institutions and instruments define the terms and regulate the process whereby financial resources flow to developing countries.⁴⁰⁹ Seen from the perspective of their common subject matter, they converge to a body of law that can be referred to as the law of development cooperation. Dann has defined the law of development cooperation as the set of rules that regulate the transfer – the allocation, programming, and implementation – of ODA.⁴¹⁰ Although this definition excludes a rapidly growing variety of forms and actors through which financing is increasingly provided to developing countries, it still aptly describes the law that governs the provision of development assistance through international organizations, which is the focus of this thesis.⁴¹¹

⁴⁰⁹ Though various aspects of development cooperation have been studied, there are still only few legal scholars that systematically engage with the processes and procedures through which development cooperation is provided. E.g. DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*; or with a broader perspective on the law of development financing, DAVIS, 'Financing Development' as a Field of Practice, Study and Innovation'; KEVIN DAVIS & MARIANA MOTA PRADO, 'Law, Regulation, and Development', in Bruce Currie-Alder, et al. (eds), *International Development. Ideas, Experience, and Prospects* (Oxford University Press, 2014); and with a more narrow perspective on international financial institutions, BRADLOW & HUNTER (eds), *International Financial Institutions and International Law*. Before, the law of development or international development law was typically associated with the normative agenda of the New International Economic Order (NIEO) and Third World Approaches to International Law (TWAIL). E.g. B. S. CHIMNI, 'Third World Approaches to International Law. A Manifesto' *International Community Law Review*, 3 (2006). Beyond, international law scholars have considered development at most for its notable absence of law. E.g. CHRISTINE M. CHINKIN, 'The United Nations Decade for the Elimination of Poverty: What Role for International Law?', 54 *Current Legal Problems*, 553 (2001).

⁴¹⁰ *Supra* note 51.

⁴¹¹ Moreover, the focus on ODA over other sources of financing is particularly relevant with regards to fragile states, where compared with other external sources of financing, ODA remains by far the most

Inasmuch as the law of development cooperation concerns the transfer of ODA at different levels of governance and through various actors, its rules vary greatly in terms of the sources and legal nature. There is no coherent international legislation that regulates most, or even the principal terms and conditions of development cooperation. Rather, development cooperation involves international, supranational or national actors providing ODA, with each essentially establishing its own rules to govern under what conditions and how.⁴¹² What is more, a considerable number of rules that govern how development cooperation is planned, managed, and delivered, is only partially formalized law. This does not mean that they cannot be effective.⁴¹³ As Dann has pointed out: “To ignore the law of development cooperation simply because of its informality would be shortsighted”.⁴¹⁴

Looking only at the rules that govern the transfer of ODA by international organizations, the variety is reduced at first. By far the largest part of the rules that establish purposes and objectives, and inform processes of multilateral development cooperation form part of the legal and policy frameworks of international organizations – or in the case of the European Union, EU law.⁴¹⁵ Accordingly, this ‘law of multilateral development cooperation’ constitutes not only an important subfield of the law of development cooperation. It could also be approached as a thematic subfield of international institutional law, which is generally concerned with the common rules and practices of public international organizations.⁴¹⁶ In fact, international institutional law provides a useful starting point for examining the

important resource flow. See OECD, *'Fragile States 2013. Resource Flows and Trends in a Shifting World'*, 47. In contrast, Davis suggests looking beyond the transfer of ODA and study the field of development finance more comprehensively. DAVIS, ‘Financing Development’ as a Field of Practice, Study and Innovation’.

⁴¹² DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 200, 217, stating that the law of development cooperation is largely donor-set law.

⁴¹³ Scholarly literature concerned with the functions and effects of various non-traditional, informal, or non-binding rules, often referred to as ‘soft law’, is extensive. See, for instance, JAN WOUTERS, et al. (eds), *Informal International Lawmaking* (Oxford University Press, 2012); and the references provided in *supra* note 56.

⁴¹⁴ DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 29, adding that “the mixing of formal and informal law can actually be seen as a characteristic feature of this area”.

⁴¹⁵ Besides, it is mostly non-binding multilateral agreements or policy declarations like the Paris Declaration (*supra* note 21) that contain specific rules concerning the transfer of ODA through international organizations.

⁴¹⁶ Generally, HENRY G. SCHERMERS & NIELS BLOKKER, *International Institutional Law. Unity within Diversity*, 4. rev. (Nijhoff, 2003); SANDS & KLEIN, *Bowett's Law of International Institutions*; and JAN KLABBERS, *An Introduction to International Institutional Law*, 2nd Edition (Cambridge University Press, 2009).

sources and legal nature of the rules that guide international organizations in providing development assistance.⁴¹⁷

The first source of international institutional law are the founding treaties or statutes of international organizations, i.e. their primary law. The statutes of international organizations are international legal treaties, which at the same time constitute quasi-constitutional frameworks for all activities.⁴¹⁸ Generally binding, they establish the functions of the organization, and some basic rules on how they ought to be exercised.⁴¹⁹ Since statutes are usually formulated in rather broad terms and without necessarily anticipating all subsequent developments, however, they need to be concretized and at times adapted to changing realities. Rather than through amendments, i.e. a formal change to the statute following the procedures established therein, concretization and adaptation is regularly done through interpretation. Few statutes of international organizations contain explicit rules on interpretation, which would explain a deviation from the general rules of interpretations established in the Vienna Convention on the Law of Treaties.⁴²⁰ In practice, however, statutes are regularly construed in a dynamic or ‘purposive’ manner, i.e. allowing for a broad interpretation of the organization’s purposes, with due regard to the dynamic evolution of the environment in which it operates.⁴²¹ This is a practice in which international development organizations, too, are generally well-versed.

Further to concretize or adapt the statutes, international organizations produce additional rules that form part of secondary law. In fact, many of the concrete rules

⁴¹⁷ Although the European Union features in major textbooks on international institutional law (e.g. *supra* note 416), the perspective of international institutional law may appear less fitting to study the rules of the European Union, which is a supranational organization. However, the particularities of the European Union’s mandate and legal framework for development cooperation that I address in this thesis have in fact little to do with its supranational decision-making procedures in some areas. Rather, it is important to note that part of the EU’s cooperation, namely that with ACP countries, rests on the basis of a multilateral treaty, the Cotonou Agreement. In detail, *infra* chapter V.2 a).

⁴¹⁸ The understanding of the statutes of international organizations as international legal contracts and/or constitutions gives rise to different arguments on how they should be interpreted, how they relate to general international law, and concerning the relation of the organization to its member states. For an overview of the discussions on the dual nature of statutes, see AHLBORN, *The Rules of International Organizations and the Law of International Responsibility*, pp. 6-13.

⁴¹⁹ On the substance of rules governing the conduct of international development organizations, see section 2 of this chapter.

⁴²⁰ Vienna Convention on The Law of Treaties, Doc. No. A/Conf39/28 (1969), Art. 31. Klabbbers questions why the interpretation of statutes should be particularly goal-oriented, rather than balancing a textual and teleological approach to interpretation as is the general rule. KLABBERS, *An Introduction to International Institutional Law*, 86-90.

⁴²¹ E.g. E. ALVAREZ JOSÉ, ‘Constitutional Interpretation in International Organizations’, in Jean-Marc Coicaud & Veijo Heiskanen (eds), *The Legitimacy of International Organizations* (New York University Press, 2001).

that inform the processes whereby international organizations provide ODA are adopted by their various organs, and hence *prima facie* belong to secondary law. Nevertheless, they are important sources of the law of development cooperation, and thus deserve more attention.⁴²²

In a broad sense, all secondary law derives its normative effect from primarily law, just as it must conform to the rules of competence, substantive, and procedural limitations contained in the organization's statute.⁴²³ With the exception of the EU, however, most statutes only scarcely regulate the processes whereby secondary rules are set and applied.⁴²⁴ Secondary rules come with a variety of denominations, ranging from resolutions, decisions, declarations and recommendations, to operational policies, guidelines, or best practice notes. Such different denominations only exemplify the variety of forms and functions secondary rules may take, and often provide little insights into their legal effects. A basic distinction is often drawn between external and internal secondary law. External secondary law refers to rules that are addressed to (member) states, other subjects of international law, or individuals, and which assume effects outside the organizational structure of the institution. In addition, all international organizations – either through an explicit authorization in their statutes or as an “implied power” – have the competence to regulate internal procedure and organizational structure, and to adopt rules to govern their operations on a daily basis.⁴²⁵ These rules are addressed to organs (or staff) of the organization and their

⁴²² DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, at 29; 217-218; BRADLOW, 'International Law and the Operations of the International Financial Institutions', at 26-27; and KINGSBURY, 'Global Administrative Law in the Institutional Practice of Global Regulatory Governance'.

⁴²³ See BENZING, 'Secondary Law', paras. 1-2: “secondary law derives from primary law in that its normative effect formally depends upon a primary source of international law.” “Normative effect” must be understood in a broad sense, as secondary rules can be binding or not, of an executive or legislative character, address states, individuals, or rather organs of the organization. See also AHLBORN, 'The Rules of International Organizations and the Law of International Responsibility', 14-21, adding that not only written rules, but also internal customary law resulting from established practices of the organization count as secondary law. In contrast, Matthias Goldmann proposes a more narrow definition, whereby secondary law comprises only “deontic, general instruments by international institutions addressed to states or other public entities that are subject to hard enforcement”. MATTHIAS GOLDMANN, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority', in Armin von Bogdandy, et al. (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010), 697.

⁴²⁴ SCHERMERS & BLOKKER, *International Institutional Law. Unity within Diversity*, § 1215; or KLABBERS, *An Introduction to International Institutional Law*, p. 203, who finds that it is not unusual for international organizations to issue instruments which were not foreseen in their statutes with such rule-making taking place “outside constitutionally controlled conditions.”

⁴²⁵ BENZING, 'Secondary Law', para. 36 On the doctrine of implied powers, see the ICJ in *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, pp. 182-183: “Under international law, the Organization must be deemed to have those powers which, though not expressly

effect is *prima facie* internal, which is why they are referred to as internal secondary law, or internal rules.⁴²⁶

Looking a bit closer at the legal nature and effects of secondary rules of international organizations, however, the distinction between external and internal effects starts blurring. It gives way to a much more complex picture, wherein the rules that different organs of international organizations usually develop autonomously in more or less formalized processes can assume a number of legal effects within and outside their institutional structures – for which the institutional law of international organizations engaged in development cooperation provides ample evidence.

The primary function of the internal rules of international organizations is still to regulate their own, effective functioning. International organizations engaged in the provision of development assistance adopt internal rules to structure and guide the allocation, programming, and implementation of aid. They adopt internal rules to guide staff, for instance, in the use of specific financial instruments, the conduct of environmental assessments, or in procurement.⁴²⁷ Besides providing substantive guidance, internal rules are used to structure the according decision-making processes, and regulate which actors within or outside the organization must be involved.⁴²⁸ Some of these rules are explicitly non-binding and have a recommendatory character. Other rules, however, organizations consider to be binding on their organs and staff. The World Bank's Operational Policies (OPs) and Bank Procedures (BPs) are a common example. OPs/BPs are abstract, general rules that are prepared in a relatively

provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.”

⁴²⁶ There is some ambiguity surrounding the concept of secondary rules as opposed to internal rules in international legal scholarship, which is related to the fact that both concepts have been described more or less broadly, and their relationship is not always clear. In principle, secondary law refers to the origin of a rule, whereas internal law rather refers to its subject matter and scope. Internal rules have been broadly defined as “the body of rules governing the functioning of the organization”, and as such can include rules both of primary law as well as institutional acts and more informally the practice of organs, if consistent and well established. E.g. PIERRE KLEIN, 'Internal Law and Rules' in *ibid.* November 2006), para. 1. In the context of the present study, “internal rules” is used to refer to the rules of internal secondary law only, and not primarily law.

⁴²⁷ Rather than strictly internal rules, the EU therefore adopts Regulations, a particularly formalized form of secondary legislation that is applicable to the institution, but also its member states and addressed individuals. See Art. 189 Treaty on the Functioning of the European Union (TFEU), and on the EU's legal framework in detail, *infra* chapter V.2 a).

⁴²⁸ JOCHEN VON BERNSTORFF, 'Procedures of Decision-Making and the Role of Law in International Organizations', in Armin von Bogdandy, et al. (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010), 797.

structured process by the Bank's Management, and which are subject to a quasi-judicial review mechanism, the Inspection Panel.⁴²⁹

In addition to regulating the conduct of international organizations in development cooperation, however, internal rules can have significant external effects on the recipient countries with which they engage. For instance, some rules are adopted as internal rules but later incorporated in the financing agreements that the organization concludes with recipients. The environmental and social safeguard policies of the World Bank and other MDBs are a prominent example. By means of reference, they are incorporated in the international legal treaties that the MDBs conclude with borrowing countries, and thus create direct obligations under international law for borrowers concerning the implementation of approved projects.⁴³⁰

In other cases, international organizations use internal rules to consolidate organizational practices or authoritative interpretations of their statutes – and hence as a more or less informal tool to adapt existing international law.⁴³¹ As we will see later, such practices of adaptation are rather common among international development organizations such as the World Bank.⁴³² The relative informality of internal rules, as opposed to the demanding process usually required for formal amendments, can facilitate the consolidation of organizational practices or interpretations. Although only very few organizations are explicitly authorized to adopt secondary rules to change the rights or obligations of member states as contained in the statute, internal rules can thus in principle have such an effect.⁴³³

⁴²⁹ See *infra* chapter IV.1 a) for a detailed analysis of the legal nature and effects of OPs/BPs.

⁴³⁰ E.g. LAURENCE BOISSON DE CHAZOURNES, 'Policy Guidance and Compliance: The World Bank's Operational Standards', in Dinah Shelton (ed) *Commitment and Compliance* (Oxford University Press, 2000), pp. 289-90.

⁴³¹ Importantly, organizational practice, i.e. the practice of the organs of the organization, is not the same as "subsequent practice" as defined in Art. 38 lit. c) of the Vienna Convention on the Law of Treaties. The latter generally refers to the practice of (all) contracting parties of the organizations' founding treaties, whereas organizational practice regularly involves only a fraction of the organization's membership. See AHLBORN, 'The Rules of International Organizations and the Law of International Responsibility', 20-21.

⁴³² On this practice, see A. RIGO SUREDA, 'Informality and Effectiveness in the Operation of the International Bank for Reconstruction and Development', 6 *Journal of International Economic Law*, 565 (2003); and *infra* chapter IV.1 a).

⁴³³ VON BERNSTORFF, 'Procedures of Decision-Making and the Role of Law in International Organizations', 796, elaborating that operational decisions that are taken outside the plenary bodies of an organization to apply internal rules can contribute to the concretization and creation of new norms, not least where they contribute to an emerging organizational practice. Schermers and Blokker find it "somewhat anomalous" that internal rules with external effects can in principle be adopted even against

These are instances where internal rules can assume an external, binding effect through interacting with ‘hard law’ – with international legal rules contained in the statute, or in international legal treaties concluded between an organization and a recipient country. Yet it is also increasingly acknowledged that rules can constrain legal subjects without even directly binding them, simply by building up sufficient pressure – economic, reputational, or other – to comply.⁴³⁴ This can also be true for internal rules of international organizations. In fact, particularly in the context of development cooperation, it is not unlikely that recipient states in need of financial assistance are in practice compelled to abide by an internal rule, although it is not formally binding on them, and actually not even addressed to them.⁴³⁵ For instance, the terms and conditions for the use of specific financing instruments are regularly set out in internal rules addressed to an organization’s staff. Recipient states that want to qualify for development funding must nonetheless meet these terms and conditions, all the more if they crucially depend on external aid.⁴³⁶ Their structural dependency can at least reduce the freedom not to engage with an organization on the terms and conditions set out in its internal rules.

Looking at the internal rules of international organizations, it is thus safe to say that the traditional doctrine of sources fails to “satisfactorily explain their legal effect and significance.”⁴³⁷ In fact, particularly rules that are formally binding only in the organization’s internal sphere have for a long time largely fallen off the radar of

the will of member states, while the procedure for their adoption is scarcely regulated. SCHERMERS & BLOKKER, *International Institutional Law. Unity within Diversity*, § 1215.

⁴³⁴ ARMIN VON BOGDANDY, et al., 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', in Armin von Bogdandy, et al. (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010), 12, arguing that “the capacity to determine another legal subject can also occur through a non-binding act which only *conditions* another legal subject. This is the case whenever that act builds up pressure for another legal subject to follow its impetus”. In the context of fragile states, Kingsbury and Davis speak of “normative requirements and regulatory templates set by global governance institutions which the state has little practical choice but to accept, whether or not there is a formal international legal obligation.” KINGSBURY & DAVIS, *Obligation Overload: Adjusting the Obligations of Fragile or Failed States*, at 4.

⁴³⁵ DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 216-218, and on the resulting legitimacy concerns, 510-511.

⁴³⁶ It is important to recall that actual development projects and programs are usually still governed by international legal agreements concluded between donor organizations and recipients, and thus based on state-consent. As Dann points out, however, these legal agreements are “intensely ‘pre-structured’ by the donors’ own rules”. *Ibid.*, 217. Besides, this pre-structuring also concerns the rules that determine to what extent national governments or other actors can participate in the processes whereby development organizations approve and implement projects. *Supra* note 428.

⁴³⁷ BENZING, 'Secondary Law', paras. 49 and 51, pointing to a “major deficit in doctrine”; with a similar conclusion, PIERRE KLEIN, 'Internal Law and Rules' in *ibid.* (November 2006), para. 12; on the question whether internal rules belong to the traditional sources of international law, see already *supra* note 54.

international law. Yet, independent of the question if and when internal rules actually constitute “law”, legal scholars and experts need to grapple with such informal or partly formalized rules if they want to understand how international organizations operate.⁴³⁸ In other words, they may refuse to call them law, but they cannot afford to ignore their effects – a statement that we have seen assumes particular relevance with regards to multilateral development cooperation.

At least two good reasons speak for considering not only the statutes, but also the internal rules of international development organizations, when analyzing the legal significance and effects of their regulatory activity on fragile states. First, particularly binding internal rules can be potent instruments in steering the conduct of organizations. Looking at the often abstract (if not outdated) rules contained in the statutes alone, it is nearly impossible to comprehend how they operate, how and by whom operational decisions are taken, and what factors matter. This is not to say that statutes are irrelevant – but the rules set out therein are often only concretized in internal rules, which thus reflect how organizations understand and operationalize their legal mandate. Moreover, internal rules reflect how organizations seek to adapt or further develop their legal mandate in response to challenges that were not foreseen in the founding treaties – including the challenges they associate with engaging in fragile states.

Second, whether binding or non-binding, internal rules regularly assume external effects: they formulate the terms and conditions, including procedural rights, for the transfer of ODA to recipient countries. They are sometimes incorporated in financing agreements and thus become formally binding, or they are used to codify organizational practices or interpretations and thus informally adapt existing rules in the statute. Arguably, organizational practice that follows repeated patterns – as can be expected where it is instructed by rules – can contribute to the development of

⁴³⁸ For a compelling discussion of the question whether informal rules in general can constitute law, see JOOST PAUWELYN, 'Is it International Law or Not, and Does It Even Matter?', in Jan Wouters, et al. (eds), *Informal International Lawmaking* (Oxford University Press, 2012). In the same volume, Jean d'Aspremont argues that international lawyers should scrutinize processes of informal law-making without necessarily elevating their products to the status of international law. JEAN D'ASPREMONT, 'From a Pluralization of International Norm-making Processes to a Pluralization of the Concept of International Law', in Jan Wouters, et al. (eds), in *ibid.*. Similarly, SABINO CASSESE, 'Is There a Global Administrative Law?', in Armin von Bogdandy, et al. (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010).

(customary) international law in certain matters.⁴³⁹ Clearly, the adoption or modification of internal rules can thus directly or indirectly affect the conduct of development cooperation with fragile states, and their roles and responsibilities in the process.

As we embark on a more thorough investigation of the rules that govern multilateral development cooperation with fragile states in the following chapters, we can rely on legal approaches that have already grappled with global governance phenomena, including activities of international organizations that reach beyond traditional, formal sources of public international law.⁴⁴⁰ They respond precisely to the fact that international institutional law faces certain limitations in grasping the legal effects and significance of internal rules, and of a plurality of normative outputs that international organizations increasingly produce. Particularly the Global Administrative Law (GAL) project and the International Public Authority (IPA) approach seek to understand and conceptualize the forms, functions, and effects of various instruments, and thus to enhance international institutional law.⁴⁴¹ The GAL perspective illuminates that many of the internal rules produced by international development organizations can be understood as different forms of regulatory administration.⁴⁴² As such, GAL propose how they could be organized and shaped by

⁴³⁹ IBRAHIM F. I. SHIHATA, *The World Bank in a Changing World*, 3 (Nijhoff, 2000), 429, speaking about the practice of the World Bank on matters of state succession; also DANIEL BRADLOW & ANDRIA NAUDÉ FOURIE, 'The Operational Policies of the World Bank and the International Finance Corporation. Creating Law-Making and Law-Governed Institutions?' *International Organizations Law Review*, 3 (2013), 7; and on the contribution of secondary law to the formation of customary international law in general, see BENZING, 'Secondary Law', paras. 4 and 32.

⁴⁴⁰ The ubiquitous and still difficult-to-grasp notion of 'global governance' generally refers to diverse processes and means whereby power and authority are increasingly exercised by a variety of actors beyond the nation state. The present focus on international organizations, however, allows putting aside some of the vexing questions that various global governance phenomena pose to international law. For this thesis, the relevance of the notion consists mostly in drawing attention to an increasing informality in many rules and procedures through which international organizations operate.

⁴⁴¹ Other projects have somewhat similar objectives, for instance, the "Informal International Law-making" project of the Graduate Institute in Geneva, which adds a fine analytical dissection of various forms of international policy-making. For a comparison of GAL, IPA, and Informal Law-making, see PHILIPP DANN & MARIE VON ENGELHARDT, 'Legal Approaches to Global Governance and Accountability: Informal Lawmaking, International Public Authority, and Global Administrative Law Compared', in Joost Pauwelyn, et al. (eds), *Informal International Lawmaking* (Oxford University Press, 2012). In addition, the central proposal of International Constitutionalism to conceive the international legal order as a vertical structure with overarching principles also constitutes a proposal to constrain the governance activities of international organization. E.g. ANNE PETERS, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 *Leiden Journal of International Law*, 579 (2006).

⁴⁴² BENEDICT KINGSBURY, et al., 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems*, 15 (2005), 16, referring to "rulemaking, administrative adjudication between competing interests, and other forms of regulatory and administrative decision and management." Notably, the focus of GAL extends far beyond the activities of public international organizations, and

reference to administrative law principles familiar from domestic legal orders.⁴⁴³ Following the IPA approach, any act of an international organization constitutes an exercise of international public authority if it serves to determine other legal subjects, i.e. “to unilaterally shape their legal or factual situation.”⁴⁴⁴ From a specific public law perspective, IPA thus explains the effects that more or less formalized rules of international development organizations can have, no matter whether they are binding or conform to established sources of international law.⁴⁴⁵ Moreover, both GAL and IPA draw attention to the importance of various interactions between formal and informal instruments, between ‘hard’ and ‘soft’ law, which are also characteristic of the law of development organizations.⁴⁴⁶

Legal approaches like GAL and IPA thus bolster my initial claim to take the internal rules of international development organizations seriously, in order to draw a more comprehensive and realistic picture of their regulatory and operational activities.⁴⁴⁷ This is not only because these approaches emphasize the variety of processes and more or less formal legal instruments through which international

includes private and hybrid actors. GAL is generally critical of the effectiveness of international institutional law “in providing a deep structure for the operational or administrative-type activities of IOs”. BENEDICT KINGSBURY & LORENZO CASINI, ‘Global Administrative Law Dimensions of International Organizations Law’, 6 *International Organizations Law Review*, 319 (2009), 329.

⁴⁴³ Developing procedures that can enhance transparency, knowledge of motives, and participation of the affected constitutes the central proposal of GAL to enhance both the effectiveness and legitimacy of governance activities beyond the state. See, for instance, DANIEL C. ESTY, ‘Good Governance at the Supranational Scale. Globalizing Administrative Law’, 115 *The Yale Law Journal*, 1493 (2006); and *infra* chapter VI.3.

⁴⁴⁴ VON BOGDANDY, et al., ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’, 11. IPA is thus deliberately more selective than the GAL project, and follows the conviction that demanding accountability for governance activities requires a clear determination of whether or not an act amounts to an exercise of international public authority. In contrast to GAL, IPA still values international institutional law as a “firm disciplinary basis” for IPA (*ibid.* 26). For more information and a list of publications emerging from this ongoing, multi-year project based at the Max Planck Institute for Comparative Public and International Law in Heidelberg, see online:

http://www.mpil.de/de/pub/forschung/forschung_im_detail/projekte/voelkerrecht/ipa.cfm (accessed December 2014).

⁴⁴⁵ Matthias Goldmann proposes a doctrine of standard instruments (*Handlungsformenlehre*) that further systematizes the form, function, and effect, for instance, of international secondary law as opposed to internal operational rules. See MATTHIAS GOLDMANN, ‘Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority’, in Armin von Bogdandy, et al. (eds), in *ibid.*

⁴⁴⁶ *Supra* note 414. On the various interactions between hard law and soft law promulgated by international organizations in general, see MARIE VON ENGELHARDT, ‘Opportunities and Challenges of a Soft Law Track to Economic and Social Rights. The Case of the Voluntary Guidelines on the Right to Food’, 42 *Verfassung und Recht in Übersee*, 502 (2009).

⁴⁴⁷ Other international legal scholars also refer to approaches like IPA and GAL to study the law and governance of development cooperation. E.g. DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 510-513; DAVIS, ‘Financing Development’ as a Field of Practice, Study and Innovation’, pp. 176-177; or KINGSBURY, ‘Global Administrative Law in the Institutional Practice of Global Regulatory Governance’, at 6.

organizations exercise governance. They also highlight and somewhat concretize the various legitimacy concerns that may arise in this context, particularly regarding rule- and decision-making processes. Again, while its effects may be significant, a large part of international organizations' rule- and decision-making is internal, subject to few legal constraints – and in the case of the World Bank, based on tenuous structures of representation.⁴⁴⁸ Whereas statutes are often “notoriously unclear” about the division of competences and procedures for rule- and decision-making, in practice, rule-making processes have long moved beyond formalized, political processes in plenary organs that are dominated by governments.⁴⁴⁹ They rather take the form of informal processes of administrative rule-making, involving an interplay of different organs of the organization. Similarly, organizations typically enjoy large discretion in making operational decisions that concern the implementation of rules, and ultimately of the organization's mandate.⁴⁵⁰ Accordingly, while rule- and decision-making in international organizations may show some similarities with domestic administrative processes, they largely lag behind the structures and procedural standards available in domestic administrative law.⁴⁵¹

Such concerns must be born in mind when examining the rules of international organizations engaged in development cooperation, including how they are made or modified. We will later return to these concerns, and the proposals made for addressing them.⁴⁵² For now, it is sufficient to emphasize that even rules that are *prima facie* internal may be legally significant, whereas decision-making processes concerning the adoption and implementation of rules often remain relatively informal and subject to few legal constraints. If internal rules are relatively formalized and considered binding on the organization's staff, as is the case with the World Bank's OPs/BPs, they can be considered a part of the organization's legal framework. If not,

⁴⁴⁸ On the World Bank's governance structure and its system of weighted voting, see *infra* chapter IV.1 a).

⁴⁴⁹ VON BERNSTORFF, 'Procedures of Decision-Making and the Role of Law in International Organizations', 778. On international organizations as “law-makers”, see the important study of ALVAREZ, *International Organizations as Law-Makers*. Also ALAN E. BOYLE & CHRISTINE M. CHINKIN, *The Making of International Law* (Oxford University Press, 2007), chapters 3 and 5.

⁴⁵⁰ This is even if international organizations increasingly choose to adopt internal rules or put up managerial controls to structure and guide their decision-making. See VON BERNSTORFF, 'Procedures of Decision-Making and the Role of Law in International Organizations', pp. 798-802, and *infra* chapter VI.3.

⁴⁵¹ KINGSBURY, et al., 'The Emergence of Global Administrative Law', pp. 37-42, showing how accountability mechanisms, rights to procedural participation and transparency, requirements of reasoned decisions, or entitlements of review, for instance, are less developed outside of domestic administrative law.

⁴⁵² *Infra* chapter VI.2 and 3.

they still belong to its broader policy framework, which I understand to include the various non-binding instruments that are produced by the organs of the organization to provide further guidance to staff in carrying out the activities of the organization. With such a basic understanding of the legal nature and potential effects of the rules that make up the legal and policy frameworks of international development organizations beyond their founding treaties, we are well equipped to study how they are adapted with regards to fragile states.

2. Basic Ideas of the Law of International Development Organizations

In this thesis, I ask not just how international development organizations adapt rules for engaging with fragile states, but also to what effect. In other words, I am concerned also with the specific outcomes of the processes whereby international organizations adapt their legal and policy frameworks. In order to analyze what a differentiated approach to development cooperation with fragile countries may consist of, we first need a basic understanding of the substance of rules that normally govern the transfer of ODA. Accordingly, having looked at the rules of international development organizations from the perspective of international institutional law to understand their legal nature and effects, I now approach the same body of rules through the prism of their common subject matter.

How do legal scholars gain a systematic understanding of a diversity of rules? They typically look for “significant regularities” that assist in structuring and better understanding the predominant ideas of a particular field.⁴⁵³ For the law of development cooperation, a relatively new field of legal research, probably the only legal scholar that has so far attempted to identify the leading ideas that permeate this

⁴⁵³ ARMIN VON BOGDANDY, 'General Principles of International Public Authority: Sketching a Research Field', in Armin von Bogdandy, et al. (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010), at 729; also ARMIN VON BOGDANDY, 'Prolegomena zu Prinzipien internationalisierter und internationaler Verwaltung', in Hans-Heinrich Trute, et al. (eds), *Allgemeines Verwaltungsrecht - Zur Tragfähigkeit eines Konzepts* (Mohr Siebeck, 2008), 692. However, the use of principles to define the regularities in a legal field is also controversial, both from a methodological perspective, and considering that the construction of principles can be said to involve “investing the law with evaluative and goal-rational meanings and thus carries normative consequences”. See in particular MARTTI KOSKENNIEMI, 'General Principles: Reflexions on Constructivist Thinking in International Law' *Oikeustiede-Jurisprudentia (Yearbook of the Finnish Law Society)*, 360 (1985), 367; or MARTTI KOSKENNIEMI, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization', 8 *Theoretical Inquiries in Law*, 9 (2006), arguing that the formulation of “legal” principles from scattered materials shows a “constitutional mindset at work” (p. 21).

field as a whole is Philipp Dann.⁴⁵⁴ He uses principles to systematize a diversity of legal sources, and to describe their common objectives and structure. Dann's work provides an important foundation, including for this thesis. It is also much broader and more ambitious however, than what we need to get a basic understanding of the substance of rules contained in the legal and policy frameworks of development organizations. Dann identifies principles that transcend not only particular organizations, but also levels of governance, considering a diversity of sources from the domestic law of donors to general international law. Moreover, he establishes not only structural principles that serve to describe basic ideas of the law of development cooperation, but also legal principles, which are legally binding and serve an evaluative function.⁴⁵⁵ In contrast, this thesis focuses on the rules stipulated in the legal and policy frameworks of international development organizations.⁴⁵⁶ My objective is first of all to outline their common substance, not to make general statements about their bindingness.⁴⁵⁷ It is therefore sufficient to concentrate on the institutional law of development organizations – and less confusing to refer not to principles, but to basic, normative ideas.

⁴⁵⁴ DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, chapter 4. Other authors have not yet attempted to identify the leading ideas of a law of development cooperation in a similarly comprehensive manner. Kevin Davis initially establishes specific directions for legal research in the field of development financing. Daniel Bradlow and David Hunter, in turn, focus more on the general international law applicable to development cooperation, than on the law of organizations engaged in development cooperation. In the traditional school of international development law again, scholars are concerned with making out principles that should ideally shape the relations between developed and developing countries, and thus with making normative claims rather than describing the existing law. For references, see *supra* note 409.

⁴⁵⁵ On the distinction between structural and legal principles and the according question of how they are derived, see in general VON BOGDANDY, 'General Principles of International Public Authority: Sketching a Research Field', pp. 729-734; or KOSKENNIEMI, 'General Principles: Reflexions on Constructivist Thinking in International Law', at 361-367; and with regards to the law of development cooperation, DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 222-224.

⁴⁵⁶ This is not to say that international development organizations cannot be bound by rules outside of their own legal frameworks. Development organizations are bound by international legal treaties they conclude with recipient states, for instance, and also by principles of customary international law, insofar as these are relevant and applicable to their conduct. See, for instance, DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 267-272, arguing that the World Bank is required to respect human rights; also BRADLOW, 'International Law and the Operations of the International Financial Institutions'. My objective is not, however, to construct a general legal framework applicable to the activities of international development organizations. Rather, it is to describe the substance of rules contained in their own legal and policy frameworks, and later to assess how these rules are adapted vis-à-vis-fragile states. There is thus no need to look beyond the institutional law of international development organizations at this point.

⁴⁵⁷ Referring to principles could connote that the common substance of rules is necessarily binding for all organizations, or of a higher normativity. In contrast, I assess the precise content and bindingness of a particular rule only with regards to the legal frameworks of individual organizations.

Are there basic ideas that emerge from the legal and policy frameworks of various international organizations engaged in development cooperation? What do they tell us about the usual objectives, processes, and role of recipient states in multilateral development cooperation? International organizations that engage in development cooperation have some rules and practices in common simply by virtue of being international organizations. Rules that can be found in the legal frameworks of all international organizations concern, for instance, their legal status and immunities, institutional structure and decision-making, conditions for membership, and funding.⁴⁵⁸ Beyond, the statutes and secondary rules of international organizations diverge in substance, in line with their respective objectives. Looking only at international organizations engaged in development cooperation, however, which share a common purpose and assume similar functions, the diversity is significantly reduced. It is hence possible to spot substantive commonalities, which are increasing as organizations with similar mandates tend to take “mimetic steps” and adopt similar rules.⁴⁵⁹

To identify and describe these commonalities, I refer to the four organizations that are subject to a more detailed analysis in the subsequent chapters: the World Bank, the AfDB, the ADB, and the European Union. My analysis hence focuses on two broad types of international development organizations: rather technocratic organizations with a specific development mandate like the World Bank, the AfDB, and the ADB, and in contrast the European Union, an organization with a much broader and essentially political, not technocratic mandate.⁴⁶⁰ Since the specific aspects of their respective legal and policy frameworks will be covered in more detail below, showing more nuances, the following overview focuses on three basic ideas that are common to all. First, the legal and policy frameworks of all organizations express what constitutes their common objective – fostering development. Along with this objective, they typically contain requirements as to how it should be pursued –

⁴⁵⁸ These rules where the statutes of different organizations show the most commonalities are also the principal subject of international institutional law. SCHERMERS & BLOKKER, *International Institutional Law. Unity within Diversity*, §7.

⁴⁵⁹ E.g. KINGSBURY, 'Global Administrative Law in the Institutional Practice of Global Regulatory Governance', 22, referring to the “[i]somorphism among clusters of institutions with similar missions, taking informal mimetic steps to resemble each other institutionally or to adopt similar operational policies.”

⁴⁶⁰ On the two types of development organizations, one with a “specialized technocratic” and one with a “diplomatic-heteronomous focus”, see DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, at 200-202. I explain above why I do not also include UNDP in the comparative analysis (*supra* note 393).

namely, by respecting standards of effectiveness. Finally, a most direct expression of the state-centric paradigm of development cooperation, all organizations are required to respect the sovereignty and ownership of recipient counterparts.

To begin with the obvious, the statutes of all international organizations that provide development assistance stipulate their purposes and objectives, which (by definition) is to support development. For instance, the Articles of Agreement of the International Development Association (IDA), the World Bank's concessional lending arm, establish that the organization shall "promote economic development, increase productivity and thus raise standards of living in the less-developed areas of the world".⁴⁶¹ The AfDB was established "to contribute to the sustainable economic development and social progress" of its members,⁴⁶² and the ADB "to foster economic growth and co-operation [...] and to contribute to the acceleration of the process of economic development".⁴⁶³ As noted before, the European Union is an organization with a much broader mandate than development – which is why it would be more accurate to refer to the EU as an organization engaged in development cooperation, not an international development organization.⁴⁶⁴ Still, the European Union's primary law stipulates "the reduction and, in the long term, the eradication of poverty" as the principal goal of EU development cooperation.⁴⁶⁵

For international organizations engaged in development cooperation, the requirement to support development or contribute to poverty reduction serves an important role in delineating the permissible scope of their activities, and in preventing the misuse of ODA for other purposes. In principle, international organizations with a development mandate must ensure that all their activities are ultimately directed at supporting development. Otherwise, an organization risks acting

⁴⁶¹ IDA Articles, Art. I. The development mandate is further concretized in Operational Policy (OP) 1.0 on Poverty Reduction, a secondary rule that formulates a broad conception of development underscoring the work of the World Bank. On the legal nature of the World Bank's OPs in detail, see *infra* chapter IV.1 a). For a more detailed discussion of the meaning of development in the World Bank's mandate, see STEFANIE KILLINGER, *The World Bank's Non-Political Mandate* (Heymanns, 2003), pp. 55-66.

⁴⁶² AfDB Agreement, Art. 1. See also the Agreement establishing the African Development Fund (signed on 29.11.2972), which is tasked "to assist the Bank in making an increasingly effective contribution to the economic and social development [...] the promotion of co-operation [...] and increased international trade" (Art. 2).

⁴⁶³ ADB Agreement, Art. 1.

⁴⁶⁴ For the sake of simplicity, I nonetheless refer to the EU as an international development organization. See *supra* note 3.

⁴⁶⁵ Treaty on the Functioning of the European Union (TFEU), Art. 208 (1). See also Art. 209 TFEU and Treaty on European Union (TEU), Art. 21 (2) lit. f).

ultra vires, i.e. outside the scope of its competence.⁴⁶⁶ This also means that international development organizations must ensure the projects and programs they finance – even if proposed and implemented by recipient governments – support development objectives, and not unrelated purposes.

The crucial question is then: what is development? The statutes of international development organizations typically do not define what precisely development entails, but leave it open to interpretation.⁴⁶⁷ As noted before, this is not unusual. Statutes in general, and the objectives and purposes of an organization in particular, are rarely phrased in narrow terms, to allow organizations to adapt to changing circumstances or demands.⁴⁶⁸ In fact, mainstream development thinking on what constitutes development has shifted considerably over the last decades: initially equated by and large with economic growth, development is now seen as a comprehensive concept, including a wide range of aspects related to socio-economic well-being, environmental sustainability – and increasingly, peace and security.⁴⁶⁹ Such conceptual shifts are regularly reflected in more or less formalized secondary rules, which international development organizations adopt to interpret and concretize what the broad notion of development contained in the statute entails for the activities of the organization. For example, all MDBs have adopted social and environmental safeguard policies, a reflection of the conceptual shift from development to (environmentally) sustainable development since the late 1980s.⁴⁷⁰

⁴⁶⁶ On the *ultra vires* doctrine, see VON BERNSTORFF, 'Procedures of Decision-Making and the Role of Law in International Organizations', 784-785. Bernstorff also highlights the doctrine's limited effectiveness and scope of application in view of the fact that international organizations can deduce "implied powers" from their mandated purposes. On "implied powers", see *supra* note 425.

⁴⁶⁷ An exception is the specification of "poverty reduction" in the EU's primary law. *Supra* note 465.

⁴⁶⁸ See *supra* chapter III.1.

⁴⁶⁹ On the shifting understanding of development, see *supra* note 285. Conceptual shifts are also reflected in multilateral agreements and international policy declarations like the UN Millennium Declaration, from which the Millennium Development Goals emerged. See United Nations Millennium Declaration, UN-GA, Res. 55/2 (September 18, 2000). The Post-2015 Development Agenda, which will succeed the Millennium Development Goals, is likely to reflect the shifting understanding of peace and security as preconditions and important aspects of development. See *supra* note 345. With a broader look at possible legal bases for a "principle of development" in the law of development cooperation, see DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, at 227-230.

⁴⁷⁰ The World Bank began introducing environmental standards in 1989, following the publication of the Brundtland Report in 1987, wherein "environmental sustainability" was rechristened as "sustainable development," hence forging a direct link between development and sustainability." *Ibid.*, 103. On the AfDB's and the ADB's environmental and social safeguards, see PHILIPP DANN & JOCHEN VON BERNSTORFF, Gesellschaft für Internationale Zusammenarbeit (GIZ) 'Reforming the World Bank's Safeguards. A Comparative Legal Analysis' (July 2013).

Together with the shifting understanding of development, the scope of activities of international development organizations has thus expanded well beyond the original mandates – sometimes into realms that originally belonged to the state’s domestic affairs.⁴⁷¹ In the light of this dynamic referred to as ‘mission creep’, drawing a strict line between activities that fall within or outside the scope of an organization’s development mandate is increasingly difficult, and the original wording of the statute does not provide much guidance.⁴⁷² As the following chapters will show, this is also true with regards to the evolving engagement of international development organizations in conflict-affected and fragile states. The understanding that development requires security, capable institutions, and functioning state-society relations has entailed a further expansion of the scope of activities of international development organizations, and influenced what is expected from recipient states.

Second, the legal and policy frameworks of all development organizations contain rules that require operations to be economically reasonable, cost-effective, and results-oriented, that is, broadly speaking, to adhere to standards of effectiveness. The respective rules can be seen as procedural add-ons to the substantive objective of development. They are contained both in the statutes and secondary rules of international development organizations.⁴⁷³ Perhaps not surprisingly, requirements of effectiveness, economy, and efficiency are particularly prominent in the mandates and internal rules of the World Bank and other MDBs. The World Bank must direct its resources towards “productive purposes”, and ensure the economic efficiency of its

⁴⁷¹ See *supra* chapter II.2 a), where I argue that the broadening notion of development implied that international organizations became concerned with (improving) the state’s actual performance in areas that go well beyond factors that directly concern its economic development.

⁴⁷² Mission creep refers to the gradual expansion of the activities of international organizations beyond the confines of the original mandate. In general, see VON BERNSTORFF, 'Procedures of Decision-Making and the Role of Law in International Organizations' at 784-785; and with regards to the World Bank, IBRAHIM F. I. SHIHATA, 'The Dynamic Evolution of International Organizations: The Case of the World Bank', 2 *Journal of the History of International Law*, 217 (2000); or JESSICA EINHORN, 'The World Bank's Mission Creep', 80 *Foreign Affairs*, 22 (2001).

⁴⁷³ Besides, standards of effectiveness are also expressed in international policy declarations, most prominently the Paris Declaration (*supra* note 21), to which all major international development organizations adhere. In this context, however, the notion of ‘aid effectiveness’ has received a much broader meaning, as expressed in the five principles that aim to make aid more effective: ownership, alignment, harmonisation, results, and mutual accountability. Whereas the latter two still appear most closely related to standards of effectiveness, particularly ownership we will address as a separate idea, namely as tribute to the sovereignty of recipient countries. For an overview of (mostly non-binding) sources that express standards of effectiveness beyond the institutional law of development organizations, see DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 284-195 (referring to a “principle of efficiency and coherence”).

loans.⁴⁷⁴ The statutes of the World Bank, AfDB and ADB require making “arrangements to ensure that the proceeds of any loan made or guaranteed by it are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency”.⁴⁷⁵ Similar rules on economic effectiveness and financial oversight can be found in the law of other development organizations, and are typical components of budgetary laws more generally. For instance, the EU must use the resources of the European Development Fund “in accordance with the principles of sound financial management, namely in accordance with standards of economy, efficiency and effectiveness.”⁴⁷⁶

On the one hand, international organizations are thus bound to ensure the cost-effective use of ODA. After all, at issue are public resources for which the donors of multilateral aid are themselves accountable to their taxpayers.⁴⁷⁷ On the other hand, development organizations are bound to ensure the effective and responsible use of ODA by recipients. Particularly the MDBs have therefore concretized standards of effectiveness in internal rules that establish detailed fiduciary, financial management, and other accountability requirements for the transfer of ODA. Such requirements may be addressed to the organizations’ staff, but ultimately fall on recipient states that seek to qualify for assistance, which therefore need a significant level of institutional and administrative capacity. Arguably, requirements have become more demanding, since aid effectiveness is increasingly seen to depend on recipients having competent, well-governed institutions that assume ownership of the development process.⁴⁷⁸ Against this background, governments with weak public financial management systems or high levels of corruption – conditions that are often associated with fragile states – are *prima facie* less likely to qualify for development assistance.⁴⁷⁹

⁴⁷⁴ IBRD Articles, Art. I (i). On the productive purpose requirement, see also *infra* chapter IV.1 b).

⁴⁷⁵ AfDB Agreement, Art. 17 lit. h), and with almost identical wording ADB Agreement, Art. 14, lit. xi) and IDA Articles, Art. V Sect. 1 lit. g).

⁴⁷⁶ See Art. 11 of the Financial Regulation applicable to the 10th European Development Fund, Council Regulation (EC) No 215/2008 of 18 February 2008. The EDF is a special budget used to finance development cooperation with ACP states. Similar “principles of sound financial management” are also established in TFEU Art. 317 (I), concerning the implementation of the EU’s general budget (including for development cooperation with non-ACP states). On the dual legal framework and separate budgets of EU development cooperation with ACP and non-ACP states, see *infra* chapter V.2 a).

⁴⁷⁷ DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 238, 501.

⁴⁷⁸ See *supra* chapter II.2 a), on how the rise of the good governance concept and the aid effectiveness agenda have influenced what is expected from recipient states in the development process.

⁴⁷⁹ *Supra* chapter II.2 b).

Last but not least, next to the objective of development and standards of effectiveness, the legal and policy frameworks of all international organizations that engage in development cooperation contain rules that require them to respect the sovereignty of recipient counterparts. Not only are international organizations generally bound by the fundamental legal principle of sovereignty, which of course pertains to recipient as well as donor states.⁴⁸⁰ What interests us is how the principle of sovereignty finds concrete expression in the rules of international development organizations, and determines the roles and responsibilities accorded to recipient states.

As noted before, development cooperation is largely state-centric.⁴⁸¹ The primacy of the sovereign state translates into the way that development cooperation must be requested, negotiated, and approved by national governments, which also assume the primary responsibility for planning and implementing development projects. In this context, we have already seen how the legal frameworks of international organizations protect recipient countries' sovereign right to consent to assistance.⁴⁸² We have also seen how the statutes of the MDBs contain provisions that expressly prohibit interference with the domestic (political) affairs of member states, a particularly noteworthy expression of the principle of non-intervention.⁴⁸³ Moreover, I have indicated that the principle of ownership – the idea that national governments should assume a lead role in planning and implementation – is not only expressed in international policy declarations that all major development organizations adhere to, but also incorporated in the legal and policy frameworks of international development organizations.⁴⁸⁴ For example, ownership constitutes a fundamental principle in the legally binding Cotonou Agreement, which regulates the EU's cooperation with ACP countries,⁴⁸⁵ while the World Bank has a dense set of internal rules that define the roles and responsibilities of recipient countries in the development process.⁴⁸⁶

⁴⁸⁰ *Supra* note 25.

⁴⁸¹ *Supra* chapter II.2 a).

⁴⁸² See the legal references provided in *supra* notes 274 (World Bank), 278 (AfDB and ADB), and 280 (EU).

⁴⁸³ See the legal references provided in *supra* notes 274 (World Bank) and 279 (AfDB and ADB); and for a comparison of the general legal principle of non-intervention and the political prohibition clause of the World Bank, see DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 255-256.

⁴⁸⁴ *Supra* notes 21 and 293.

⁴⁸⁵ Cotonou Agreement, Art. 2, and also EC Regulation No 1905/2006 of 18 December 2006 L 378/41, establishing a financing instrument for development cooperation, i.e. binding EU secondary law. See also the European Consensus on Development, wherein ownership, partnership, and in-depth political

Broadly speaking, different aspects of the legal principle of sovereignty are thus concretized in the substantive and procedural rules of international development organizations: autonomy and self-determination regarding decisions that concern the core of domestic affairs, non-intervention, and formal equality.⁴⁸⁷ With regards to the latter, however, it must be noted that it is not unusual for international (development) organizations to differentiate between member states on the basis of functional or other considerations, to their advantage or detriment.⁴⁸⁸ For instance, the statutes of the MDBs do not formulate a principle of equal treatment of all member states, like the UN Charter in Art. 2 (1).⁴⁸⁹ Considering that all MDBs use a system of weighted voting, the protection of sovereignty in the legal and policy frameworks of international development organizations does not embrace a general right to procedural equality in the processes of development organizations either.⁴⁹⁰ However, such deviations from formal equality in the strict sense are based on mutual consent, insofar as they go back to the statutes that each member state chose to ratify at one point.

Moreover, it is important to emphasize that the legal and policy frameworks of international development organizations do not simply translate the legal principle of

dialogue are listed among common principles in para. 4. Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus', (2006/C 46/01), 24.2.2006.

⁴⁸⁶ For instance, the World Bank's BP 2.11, para. 2 requires its staff to start "from the country's vision of its development goals" when devising a strategy of how to assist a country. See also *infra* chapter IV.4, on the role of recipient governments in the World Bank's legal regime for project lending, budget assistance, and Program-for-Results (PforR) financing.

⁴⁸⁷ On the different aspects of the principle of sovereignty, see, for instance, JULIANE KOKOTT, 'Sovereign Equality', in Rüdiger Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, April 2011), paras. 20-54; BROWNLIE, *Principles of Public International Law*, 287; or CRAWFORD, *The Creation of States in International Law*, 32-33.

⁴⁸⁸ E.g. BENEDICT KINGSBURY, 'Sovereignty and Inequality', 9 *European Journal of International Law*, 599 (1998), 605, pointing out that sovereign equality in the design of new international organizations is regularly compromised, since it is balanced with functional concerns, the need for efficacy, as well as the political interests of powerful member states. For a comprehensive analysis of the principle of sovereign equality in the decision-making of international financial and political institutions, see ATHENA DEBIE EFRAIM, *Sovereign (In)Equality in International Organizations* (Martinus Nijhoff, 2000).

⁴⁸⁹ E.g. LEONIE GUDER, *The Administration of Debt Relief by the International Financial Institutions. A Legal Reconstruction of the HIPC Initiative* (Springer, 2009), 158-161, pointing out that unlike the IMF, the World Bank has never explicitly recognized a principle of equal treatment in its legal framework. In contrast, the EU is principally bound to treat its member countries equally, but the recipients of EU aid are not included in the EU's membership. In fact, the EU's legal framework for development cooperation even makes differentiation between different recipient countries a key principle. See Cotonou Agreement, Art. 2; DCI Regulation, Art. 3 (2); or the European Consensus on Development, paras. 56-66; and in detail, *infra* chapter V.2. a) and d).

⁴⁹⁰ See EFRAIM, *Sovereign (In)Equality in International Organizations*, Part IV and pp. 365-366; and on the World Bank's system of weighted voting, *infra* chapter IV.1 a).

sovereignty, but in some respects also reformulate it.⁴⁹¹ This becomes most apparent when we look again at the principle of ownership. The principle suggests that recipient states should take the lead over and the responsibility for their own development, and hence reaffirms the freedom to determine their own political, economic, and social system.⁴⁹² Yet, ownership is not just an entitlement, but also entails duties for recipient states, like formulating a national development strategy, and taking responsibility for its implementation – duties that presuppose a certain level of capacity on the parts of state institutions, which is not always given.

Further, the ownership principle is often formulated to address actors outside of the national government, such as parliaments, local authorities, or civil-society representatives. For instance, Article 2 of the Cotonou Agreement between the EU and ACP countries states that their “partnership shall encourage ownership of the development strategies by the countries and populations concerned”.⁴⁹³ In this sense, ownership in development cooperation could be seen to draw not just on the principle of state sovereignty, but also on the international legal principle of self-determination of peoples.⁴⁹⁴ In the World Bank’s legal framework, however, ensuring the participation of actors at the sub-state and non-state level is just a further requirement on national governments, which thus remain the primary addresses of ownership.⁴⁹⁵

In sum, the objective of development, standards of effectiveness, and the protection of recipient sovereignty and ownership constitute basic ideas expressed in the legal and policy frameworks of all international organizations engaged in development cooperation. Others could perhaps be added – for instance, accountability, a somewhat elusive term that has become central to many policy discussions concerning development cooperation in the last decade, and which also informs a number of rules contained in the legal and policy frameworks of

⁴⁹¹ Dann refers to the principle of ownership as a regime-specific reformulation of the principle of sovereignty, and thus acknowledges that it is not fully congruent with the more comprehensive legal principle of sovereignty. DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 241.

⁴⁹² For a definition of ownership, see *supra* note 291.

⁴⁹³ Cotonou Agreement, Art. 2.

⁴⁹⁴ The principle of self-determination is prominently expressed in the UN Charter, Art. 1 (2) and 55, as well as Art. 1 (3) of the International Covenant on Civil and Political Rights (ICCPR) and of the International Covenant on Economic, Social and Cultural Rights (ICESCR) respectively. See also DANIEL THÜRER & THOMAS BURRI, 'Self-Determination', in Rüdiger Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008).

⁴⁹⁵ BP 2.11 on Country Assistance Strategies, para. 8.

international organizations.⁴⁹⁶ More nuances will also emerge from the subsequent analysis of the legal and policy frameworks of selected organizations. For example, human rights are a central idea in the rules that govern the EU's development cooperation, but are hardly reflected in those of the MDBs.⁴⁹⁷ Accordingly, human rights have perhaps become an important, normative yardstick for processes and outcomes of development cooperation, where it is increasingly discussed to what extent they are binding on international organizations.⁴⁹⁸ The legal and policy frameworks of most international development organizations, however, do not reflect this paradigm shift.⁴⁹⁹

The basic ideas that inform the law of international development organizations relate to each other, just as they may conflict with each other.⁵⁰⁰ Accordingly, typical goal conflicts that occur in the practice of development organizations can also involve conflicts between different rules of their legal and policy frameworks. For example, national ownership is regularly considered key to the effectiveness of multilateral development cooperation.⁵⁰¹ Yet where international organizations impose detailed conditionality on recipient states, e.g. concerning the design of public financial management systems to ensure the effective use of ODA, they also restrict autonomous decision-making in recipient countries. Similarly, the objective of development comes into conflict with the sovereignty of recipients as soon as organizations and national governments hold diverging views on what development

⁴⁹⁶ For an overview, including of the legal sources and avenues of accountability in the law of the World Bank and EU, see DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, chapter 9.

⁴⁹⁷ Ibid., 272-273, and *infra* chapter V.2. Regarding the MDBs, some of their internal rules are at least informed by or promote human rights concerns – usually not explicitly, but there are some exceptions. For instance, the World Bank's Operational Policy 4.10 on Indigenous Peoples explicitly refers to the human rights of indigenous people (at para.1), and the umbrella policy of AfDB's Integrated Safeguards System states that "The Bank is committed to respecting and promoting Human Rights on the African continent" (at para. 11).

⁴⁹⁸ On the relevance and applicability of human rights to the activities of international organizations in general, see SANDS & KLEIN, *Bowett's Law of International Institutions*, 458-59; regarding the World Bank, SIGRUN I. SKOGLY, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (Cavendish, 2001); and regarding the UN, MAC DARROW & LOUISE ARBOUR, 'The Pillar of Glass: Human Rights in the Development Organizations of the United Nations', 103 *American Journal of International Law* 446 (2009).

⁴⁹⁹ Accordingly, Philipp Dann argues that human rights constitute the basis for a legal principle in the law of development cooperation, but with regards to international organizations, he draws mainly on international human rights law, rather than their own rules. See DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 267-272, on the international human rights obligations of the World Bank.

⁵⁰⁰ On typical, normative tensions in the law of development cooperation, see also *ibid.*, 295-298.

⁵⁰¹ The Paris Declaration therefore formulates national ownership as one of five principles of aid effectiveness (*supra* note 21).

entails. Indeed, development organizations increasingly curtail the realm of exclusive domestic decision-making as they become engaged with essentially political subject matters such as good governance and state-building, based on a broad interpretation of their mandate. The objective of development can in turn conflict with standards of effectiveness, considering situations where external assistance is vital for supporting a country's development, but weak state institutions cannot guarantee the cost-effective, results-oriented, and accountable use of ODA.

Such inherent tensions and potential conflicts in the legal and policy frameworks of international development organizations will reappear when we look at their engagement with fragile states. For instance, one central conflict that has already emerged from the previous chapters is that between safeguarding the sovereignty and ownership of recipient states with barely effective government, and making sure that standards of effectiveness in development cooperation are upheld. It is a conflict that could also be expressed in terms of long-term versus short-term goals. How international development organizations address this and other goal conflicts – or conflicts between different rules of their legal and policy frameworks – will be a question addressed in the subsequent chapters.

3. Conclusion

This chapter sought to provide a basic understanding of the legal nature and common substance of rules that make up the legal and policy frameworks of international development organizations. As the body of rules that governs how international organizations usually transfer ODA to recipient countries, it also provides a basis for studying how, and to what effect, they adapt their legal and policy frameworks vis-à-vis fragile states. Within the broader field that constitutes the law of development cooperation, my focus was therefore more narrowly on the law of international development organizations. In order to clarify the legal nature and effects of its rules, I first approached the law of international development organizations through the prism of international institutional law. I drew particular attention to the significance of secondary rules, namely internal secondary rules, in instructing the conduct of development organizations. They can have a critical impact on the outcomes of decision-making for which they provide the set-up, and further sizeable, external effects on recipient states. Subsequently, I approached the same

body of rules through the prism of their common subject matter, development cooperation, and identified a number of substantive commonalities in the rules of different development organizations. The identified basic ideas – the objective of development, standards of effectiveness, and protections of sovereignty and ownership – serve to broadly describe the substance of analysis, the law of international development organizations. At the same time, they could be seen as a baseline for analysis, when it comes to asserting in what respect the rules of international development organizations differ for fragile states.

With this basic understanding of the legal nature and common substance of the law of international development organizations, we are well equipped to study how they respond to the challenges of engaging with fragile states – from a legal perspective. But what is the value, one may ask, of studying from a legal perspective an issue that has been repeatedly shown to challenge or exceed the scope of law? Fragile state is no legal term or concept, and law generally does not account for state fragility as in varying degrees of government effectiveness. Moreover, its contribution to the “real debate about development and governance” (Crawford) is limited.⁵⁰² Certainly, not all of the challenges that international development organizations encounter when seeking to engage with fragile states concern their legal mandates. They face an intricate blend of technical, political, and legal questions when dealing with fragile states, and their response needs to be conceived in light of such different reasoning.⁵⁰³ What is more, in focusing on the rules of international development organization, we tend to forget that they are not necessarily implemented, or that implementation may be sketchy. In this sense, the focus on rules could be seen to obstruct the view at the activities of development organizations in practice, and ultimately divert attention away from questions that ought to be at the center of inquiry instead.

It is important to acknowledge these constraints, and yet a legal analysis that structures and describes, interprets and evaluates the rules that international development organization make or modify to engage with fragile states remains immensely significant. First, legal scholars can explain the substance of rules, which in itself is a relevant task considering that many of the rules at issue here have so far

⁵⁰² *Supra* note 232.

⁵⁰³ See *supra* chapter II.2 b) for an overview of the different challenges that development organizations face when aiding fragile states.

received little to no attention. For instance, the internal rules of international development organizations like the World Bank are often not on the radar even of those that may be directly affected by them. In this regard, analyzing the rules that govern under what conditions and how ODA is provided specifically to fragile states contributes to greater transparency.

Second, how organizations adapt their legal and policy frameworks – e.g. whether they prefer to adopt new rules or modify existing rules, whether they introduce exceptions specifically for fragile states or make changes that concern all potential recipient states, whether they prefer detailed rules or instead favor greater room for discretion – are all important questions to answer from a legal perspective. But the answers equally shed light on key parameters of how international development organizations seek to address fragile states. In essence: Is it a through a systematic approach that acknowledges their special circumstances and needs – or rather a half-hearted attempt to circumvent legal constraints to engage in countries of special interest?

Last but not least, law naturally serves an evaluative function, which is why we will consider whether the rules that international organizations make or modify to govern engagement with fragile states are in conformity with their primary law. But oftentimes, my focus will be on the processes through which they adapt their legal and policy framework, as much as on specific outcomes.⁵⁰⁴ For legal scholars are also well placed to scrutinize competences, and to dissect more or less formalized processes of rule- and decision-making, looking at who has the right to participate and who has not. They are thus well placed to shed light on distributions of power, and these are important to consider in a policy field that may appear technical at first, but essentially concerns a political process. Ultimately, in this political process, it also matters what questions are subjected to regulation, and which are deliberately left unregulated.

⁵⁰⁴ In fact, Kevin Davis finds that the most valuable role for lawyers in analyzing the “law of financing development” and how it evolves is precisely in “processes by which the law of financing development adapts and innovates, rather than on specific outcomes of that process. DAVIS, ‘Financing Development’ as a Field of Practice, Study and Innovation’, 183.

IV. The World Bank's Engagement with Fragile States – A Legal Perspective

The World Bank is the largest and the most influential international development organization, both in terms of financial resources and knowledge. In fiscal year 2014, the organization committed a total of USD 40.8 billion in financial assistance globally to low- and middle-income countries.⁵⁰⁵ Seventy years after its establishment, in a global political landscape that has profoundly changed, the World Bank's role as an important agenda-setter in the international development community remains largely undisputed.⁵⁰⁶ This is also due to the organization's track record of adapting to changing demands and needs – turning from a financier of infrastructural development to a promoter of good governance, and more recently, from a “Knowledge Bank” to a “Solutions Bank”.⁵⁰⁷ Moreover, an organization still largely absent from countries affected by conflict three decades ago, the World Bank has become the second most important contributor of multilateral ODA to fragile states – and is second to none when it comes to promoting and operationalizing the notion of fragile states.

In light of its financial leverage, intellectual influence, and role as a policy pioneer, there is ample reason to focus on the World Bank for a detailed analysis of how, and to what effect international development organizations adapt their legal and policy frameworks to engage with fragile states. In addition, the World Bank makes for an interesting and rewarding case study because it has a comparatively well-structured and transparent legal and policy framework. Lawyers constitute a small minority in an organization largely run by economists, but they play an important role in interpreting the Bank's mandate in light of changing circumstances. Emerging practices are often captured and consolidated in internal rules, which are publically

⁵⁰⁵ THE WORLD BANK, 'Annual Report 2014' (2014), 7.

⁵⁰⁶ See CHRISTOPHER L. GILBERT, et al., 'Positioning the World Bank', in Christopher L. Gilbert & David Vines (eds), *The World Bank. Structure and Policies* (Cambridge University Press, 2000), characterizing the Bank as a global player in development; also NICOLAS STERN & FRANCISCO FERREIRA, 'The World Bank as “Intellectual Actor”', in Devesh Kapur, et al. (eds), *The World Bank. Its First Half Century. Volume 2: Perspectives* (Brookings Institution, 1997); or DANNY LEIPZIGER, 'The Role and Influence of International Financial Institutions', in Bruce Currie-Alder, et al. (eds), *International Development. Ideas, Experience, and Prospects* (Oxford University Press, 2014), at 836-839.

⁵⁰⁷ For a critical discussion of whether the strategic shift to a “Knowledge Bank” has brought substantial change, see JOHN TOYE & RICHARD TOYE, UN Research Institute for Social Development, Programme Paper Series 11, 'The World Bank as a Knowledge Agency' (November 2005), pp. 6-12.

available and amenable to legal analysis. Certainly, a change in the rules does not always result in behavioral changes: staff incentives and institutional culture matter, and particularly the latter is slow to change in a huge bureaucracy like the World Bank. There may sometimes be a gap between *de jure* and *de facto* practice, which is important to acknowledge.⁵⁰⁸ The focus of this thesis, however, is on the former: how international organizations make or modify rules to consolidate or formalize a differentiated approach to fragile states. For this, the World Bank provides important evidence.

This chapter begins with an outline of the World Bank's legal framework and mandate, highlighting how internal rule-making and legal opinions have paved the way for the organization's growing involvement in fragile states (IV.1). Next, I explore how the Bank defines and classifies fragile states, and what consequences attach to the classification under the legal and policy framework (IV.2). On this basis, the subsequent two sections analyze and assess how the Bank has adapted its legal and policy framework to engage in countries that appear to lack effective government counterparts – in a formal, juridical sense (IV.3), or in terms of empirical capacity (IV.4). In conclusion, I examine whether being seen as fragile constitutes an advantage, or a disadvantage for a member state in its dealings with the World Bank (IV.5).

1. The World Bank and its “Law”

What is commonly referred to as the “World Bank” in fact consists of two international organizations, the International Bank for Reconstruction and Development (IBRD), and the International Development Association (IDA).⁵⁰⁹ Both organizations have separate legal personalities and were founded by two different international legal treaties that set out their respective mandates, the IBRD Articles of Agreement of 1944, and the IDA Articles of Agreement of 1960. The two organizations have an analogous organizational structure, however, which largely

⁵⁰⁸ See, for instance, BRADLOW & NAUDÉ FOURIE, 'The Operational Policies of the World Bank and the International Finance Corporation. Creating Law-Making and Law-Governed Institutions?', 27.

⁵⁰⁹ The “World Bank Group” in turn consists of five institutions: the IBRD; the IDA, as well as the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). The World Bank Group as such has no legal personality. MAURIZIO RAGAZZI, 'World Bank Group', in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (Oxford University Press, March 2010), para. 5.

resembles the tripartite model of other organizations. The organ that is responsible for general policy-making and vested with the highest decision-making authority is the Board of Governors, where all member states are typically represented by their finance or development ministers.⁵¹⁰ The Board of Governors has delegated far-reaching powers to the Board of Directors (or Executive Board), which consists of 25 member state representatives that together preside over the organizations' day-to-day business.⁵¹¹ Notably, the same representatives constitute the Board of Governors and the Executive Board of both the IBRD and the IDA.⁵¹² The World Bank's President heads the staff of civil servants, and is responsible for the "ordinary business" of both organizations.⁵¹³

The following section introduces the World Bank and its "law".⁵¹⁴ I begin by looking a bit closer at the rules that make up its legal framework, and at the means available for its adaptation (a). Next, I outline the substance of the World Bank's mandate in light of dynamic interpretations, which have prepared the grounds for the organization's growing engagement in fragile states (b).

a) Legal Framework and Means of Adaptation

The World Bank legal framework is primarily determined by its statutes, the Articles of Agreement of the IBRD and the IDA. Like the statutes of most international organizations, they are formulated in relatively broad terms, and need to be concretized through the adoption of secondary rules that govern operations on a

⁵¹⁰ IBRD Articles Art. V, Sect. 2 lit. (a) and (b) and IDA Articles Art. VI, Sect. 2 lit. (a) and (c).

⁵¹¹ IBRD Articles Art. V, Sect. 5 (a) and IDA Articles Art. VI, Sect. 4 (a). The Executive Directors work on-site at the World Bank's headquarters, where they meet twice per week to determine its general policies, decide on all loans or grants to be awarded, and exercise oversight.

⁵¹² IBRD Articles Art. V, Sect. 5 and IDA Articles Art VI, Sect. 5.

⁵¹³ IBRD Articles Art. V Sect. 5; IDA Articles Art. VI Sect. 5. The Articles of Agreement regulate that the President is elected by the Executive Directors and executes his tasks under their "direction", just as his time in office depends on their verdict. At the same time, he chairs their meetings and thus participates in all their discussion, even if he is not allowed to vote. On the division of competencies between the Board of Directors and the President, see SHIHATA, *The World Bank Legal Papers*, 639 ff.

⁵¹⁴ Whereas the legal nature of the Bank's founding treaties as international legal treaties is undoubted, it is subject to controversy whether its internal rules qualify as "law". As noted in chapter III.1, I will not hinge on the question whether or not we want to call these rules "law", but rather demonstrate why international lawyers should study them. See also BRADLOW & NAUDÉ FOURIE, 'The Operational Policies of the World Bank and the International Finance Corporation. Creating Law-Making and Law-Governed Institutions?', 7-9, with a convincing argument for assessing the World Bank's internal rules in legal terms – even if the Bank itself may not do so.

daily basis.⁵¹⁵ The Articles explicitly authorize the Board of Governors and the Executive Board “to adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank”.⁵¹⁶ Accordingly, the World Bank has adopted By-Laws to complement the Articles of Agreement, and General Conditions that are incorporated by reference in all financing agreements concluded with a country. Both the Board of Governors and the Executive Board also adopt Resolutions, which are of a more executive character, but equally binding.⁵¹⁷

It is a different instrument that forms part of the legal framework – the “law” – of the World Bank, however, that is of particular interest and importance in guiding the conduct of its activities: Operational Policies (OPs) and Bank Procedures (BPs). OPs are internal rules of an abstract, general character, which typically “establish the parameters for the conduct of operations”, while BPs lay out the according procedural requirements.⁵¹⁸ What makes the World Bank’s OPs and BPs so interesting and important, and explains why they have received much more attention in legal scholarship than the internal rules of other organizations?⁵¹⁹

⁵¹⁵ On the primary and secondary law of international (development) organizations, see also *supra* chapter III.1.

⁵¹⁶ IBRD Articles Art. V, Sect. 2 lit. (f) and IDA Articles Art. VI, Sect. 2, lit. (h). The Executive Directors may adopt rules only “to the extent authorized”, i.e. in the context of exercising their functions delegated by the Board of Governors. Besides, some other provisions contain explicit authorizations for an organ, usually the Board of Governors, to adopt regulations for a specific purpose (e.g. IBRD Articles, Art. 5, Sect. 2 lit. (e) and Sect. 4 lit. (h)).

⁵¹⁷ On the bindingness of decisions of the Board of Governors and the Executive Board, GUDER, *The Administration of Debt Relief by the International Financial Institutions. A Legal Reconstruction of the HIPC Initiative*, 137-140; and on the World Bank’s secondary law more generally, MATTHIAS MOSLER, *Finanzierung durch die Weltbank. Grundlegung und anwendbares Recht der vertraglichen Instrumente* (Duncker & Humblot, 1987), chapter 2.

⁵¹⁸ See the definition of OPs in the World Bank’s Operational Manual, which contains all OPs and BPs. BPs accordingly “explain how Bank staff carries out the policies set out in the OPs”, in that “[t]hey spell out the procedures and documentation required to ensure Bank-wide consistency and quality.” The Operational Manual is available online: <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20249090~menuPK:64142516~pagePK:64141683~piPK:64141620~theSitePK:502184,00.html> (accessed November 2014).

⁵¹⁹ On the Bank’s OPs in general, see ALVAREZ, *International Organizations as Law-Makers*, pp. 235-241; or BRADLOW & NAUDÉ FOURIE, ‘The Operational Policies of the World Bank and the International Finance Corporation. Creating Law-Making and Law-Governed Institutions?’, at 5, defining OPs as “internal documents [...] that contain normative prescriptions (some ‘binding’ on IFI staff, others not) concerning the manner in which these development institutions’ operations ought to be performed.” On the emergence of OPs, see BOISSON DE CHAZOURNES, ‘Policy Guidance and Compliance: The World Bank’s Operational Standards’; on their normative quality, DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 189-192; and on their particular effects, BENEDICT KINGSBURY, ‘Operational Policies of International Institutions as Part of the Law-Making Process. The World Bank and Indigenous Peoples’, in Guy S. Goodwin-Gill & Stefan Talmon (eds), *The Reality of International Law. Essays in Honour of Ian Brownlie* (Oxford University Press, 1999).

To begin with, they are comparatively elaborate and formalized internal rules. Unlike many other international organizations, the World Bank clearly differentiates between internal rules that are binding for staff, and those that are only of a recommendatory nature, for instance, Good Practice Notes. Approved by the Executive Board, OPs and BPs are considered binding and must be published.⁵²⁰ They may show varying levels of concreteness, and are not always “applied legalistically”.⁵²¹ However, staff’s compliance with OPs and BPs in the project cycle can be subject to a quasi-judicial review mechanism, the Inspection Panel.⁵²² Deviations from OPs/BPs in the form of waivers need to be requested and formally approved by the Executive Board.⁵²³

Although OPs/BPs have a comparatively high level of formality and act as binding rules within the internal sphere of the Bank, the Articles do not contain procedural requirements for their formulation and adoption.⁵²⁴ OPs and BPs are developed in a largely internal process that has gradually merged into a coherent organizational practice.⁵²⁵ They are usually prepared by the Bank’s Operational Policies and Country Services (OPCS) department, and examined by Management in

⁵²⁰ World Bank, Access to Information Policy (July 1, 2013), para. 6. This may include draft versions of OPs (para. 23, lit. (b) (i)).

⁵²¹ KINGSBURY, ‘Operational Policies of International Institutions as Part of the Law-Making Process. The World Bank and Indigenous Peoples’, 329.

⁵²² The Inspection Panel has the power to control whether staff members have complied with the OPs and BPs during the planning and implementation stages of Bank-financed operations, and can receive complaints directly from a party affected by the Bank’s operational activities in a country, where those have caused harm. On the powers of the Panel, see IBRD Resolution 93-10 of September 22, 1993, para. 12. Notably, the Panel only reviews policies that govern the project cycle in a more narrow sense. On other institutional guarantees for the implementation and monitoring of the Bank’s policies, see BRADLOW & NAUDÉ FOURIE, ‘The Operational Policies of the World Bank and the International Finance Corporation. Creating Law-Making and Law-Governed Institutions?’, 37-40.

⁵²³ In April 2014, the World Bank has adopted a new Bank Policy on Operational Policy Waivers, to codify a previously informal practice. In essence, policy waivers are approved by the Board if they are proposed prior to the approval of a loan to which the policy deviation relates. The Board approves the waiver at the same time as the loan itself. If a waiver is required during project implementation, i.e. after Board approval, it is approved by the Managing Director with the advice of the General Counsel and the Vice President of OPCS.

⁵²⁴ See ALVAREZ, *International Organizations as Law-Makers*, 235, who finds that OPs and BPs “are not the product of any explicit provision in the Bank’s charter”. However, it is not necessarily unusual for international organizations to issue instruments that were not foreseen in their statutes. See *supra* note 433.

⁵²⁵ On the rule-making process, see DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 188-189; and RIGO SUREDA, ‘Informality and Effectiveness in the Operation of the International Bank for Reconstruction and Development’, 580-581; on the roles of the respective roles of the Executive Board and Management, SHIHATA, *The World Bank Legal Papers*, chapter 27. Notably, the World Bank has embarked on a reform and consolidation of its system of internal rules in a new “Policy & Procedure Framework” (P&PF), which could also entail the codification of the rule-making process. See The World Bank, *The Bank’s Operational Policy Manual: Issues and Prospects for Reform*, Approach Paper (April 1, 2011).

consultation with the Board of Executive Directors. Typically, the Executive Board will approve the basic principles of a Policy, while Management remains responsible for elaborating the details. Besides, the World Bank has increasingly invited affected or interested parties to comment on drafts of its Policies.⁵²⁶

Member states are thus principally involved in the rule-making process through the Executive Board, but the influence of recipient states is limited given the composition and weighted voting procedures of the Executive Board. At the World Bank, how much a country contributes financially formally translates into its decision-making influence.⁵²⁷ Only the World Bank's five largest financial contributors – the US, Japan, Germany, France, and the UK – have the right to appoint their own Director in the Executive Board.⁵²⁸ The remaining 183 member countries elect the 20 Directors representing them every two years, according to regional alliance. Further, decisions are taken on the basis of a weighted system of voting. Member states that contribute more to the capital base of the organizations are thus allocated a higher percentage of votes.⁵²⁹ The fact that the World Bank's voting and representation rules do not strictly reflect the principle of sovereign equality is

⁵²⁶ The revision of the Bank's policy on Indigenous People is a prominent example, which involved a relatively extensive process of external consultation. See BRADLOW & NAUDÉ FOURIE, 'The Operational Policies of the World Bank and the International Finance Corporation. Creating Law-Making and Law-Governed Institutions?', 24-27; and in detail DAVID HUNTER, 'International Law and Public Participation in Policy-making at the International Financial Institutions', in Daniel Bradlow & David Hunter (eds), *International Financial Institutions and International Law* (Kluwer, 2010).

⁵²⁷ This is particularly true for the IDA, since it almost exclusively relies on financial contributions from its members. In contrast, the IBRD can also raise its own money on the capital market and is thus less dependent on its members. DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 184.

⁵²⁸ Besides, based on an informal agreement between the USA and European member states, the President of the World Bank has always been an American citizen nominated by the USA, the organization's most powerful shareholder. On the role of the United States as the largest shareholder of the World Bank, see BARTRAM S. BROWN, *The United States and the Politicization of the World Bank. Issues of International Law and Policy* (Kegan Paul International, 1992); or JOHN W. HEAD, 'For Richer or For Poorer: Assessing the Criticisms Direct at the Multilateral Development Banks', 52 *Kansas Law Review*, 241 (2004), pp. 267-268, 299.

⁵²⁹ IBRD Articles, Art. V, Sect. 3 and IDA Articles, Art. VI Sect. 3. The unequal influence of the Bank's largest shareholders on the organization's decision-making is widely canvassed in the scholarly debate, and has drawn much criticism given the Bank's leverage over many developing countries. E.g. EFRAIM, *Sovereign (In)Equality in International Organizations*, 212-214; or NGAIRE WOODS, 'The Challenges of Multilateralism and Governance', in Christopher L. Gilbert & David Vines (eds), *The World Bank. Structure and Policies* (Cambridge University Press, 2000). In response to its critics, the Bank has increased the voting power of all developing countries and provided for one more Executive Director to represent countries from Sub-Saharan Africa. See the Report of the High-Level Commission on Modernization of World Bank Group Governance, *Repowering the World Bank for the 21st Century* (2009); and with a critical assessment: DANIEL BRADLOW, 'The Reform of Governance of the IFIs: A Critical Assessment', in Hassane Cissé, et al. (eds), *The World Bank Legal Review. Volume 3. International Financial Institutions and Global Legal Governance* (The World Bank, 2012).

thus important to bear in mind when considering the role of the Executive Board in processes of rule-making and adaptation.⁵³⁰

Despite the relative informality of the rule-making process, OPs/BPs have assumed an enormous significance in steering the Bank's operations, and also constitute a prime example for the external effects of internal rules.⁵³¹ We have seen that environmental and social safeguard policies, for instance, are regularly incorporated in the financing agreements that the Bank concludes with recipient countries, and thus create direct obligations under international law.⁵³² Even if they do not become directly binding on a country, with many OPs and BPs forming part of the legal and policy framework that governs how projects are approved, any government seeking financing from the World Bank must in practice respect them – all the more if they dependent on external assistance.⁵³³ Besides, other international financial institutions often copy the Bank's Ops/BPs, which arguably become “*de facto* global standards among other development banks”.⁵³⁴

Finally, it is important to note that the World Bank uses OPs/BPs to consolidate organizational practices and mandate interpretations, and thus as a means to adapt its legal framework. The principal avenues for adapting the Articles of Agreement are formal amendment or interpretation. The Bank has rarely modified its statute by means of amendment, which would require a qualified majority in the Board of Governors.⁵³⁵ Instead, it relies on interpretation, a task that is incumbent upon the Executive Directors.⁵³⁶ As an instrument of adaptation, interpretation is less inclusive

⁵³⁰ Notably, the principle of sovereign equality is regularly compromised in the decision-making structure of international (development) organizations. See *supra* chapter III.2.

⁵³¹ In general, see *supra* chapter III.1; and on the effects of OPs and BPs beyond regulating staff behavior, see, for instance, KINGSBURY, 'Operational Policies of International Institutions as Part of the Law-Making Process. The World Bank and Indigenous Peoples', pp. 338-342; BOISSON DE CHAZOURNES, 'Policy Guidance and Compliance: The World Bank's Operational Standards', pp. 289-90; or ALVAREZ, *International Organizations as Law-Makers*, pp. 237-238

⁵³² *Supra* note 430.

⁵³³ On the constraining potential of non-binding rules, see already *supra* chapter III.1.

⁵³⁴ GALIT A. SARFATY, 'The World Bank and the Internationalization of Indigenous Rights Norms', 114 *Yale Law Journal*, 1791 (2004-2005), 1792; also LAURENCE BOISSON DE CHAZOURNES, 'Partnerships, Emulation, and Coordination: Toward the Emergence of a Droit Commun in the Field of Development Finance', in Hassane Cissé, et al. (eds), *The World Bank Legal Review. Volume 3. International Financial Institutions and Global Legal Governance* (The World Bank, 2012).

⁵³⁵ IBRD Articles Art. VIII lit. (a) and IDA Articles Art. IX lit. (a). Amendment procedures are typically much more cumbersome than interpretations, not least since the plenary organs of international organizations are often blocked by political struggles and considered as less productive or effective. VON BERNSTORFF, 'Procedures of Decision-Making and the Role of Law in International Organizations', 786.

⁵³⁶ IBRD Articles Art. IX lit. (a); IDA Articles Art. X lit. (a). On interpretation and amendment of the Articles of Agreement, see also SHIHATA, *The World Bank in a Changing World*, pp. 3-19; and on the

than amendment, since a simple majority of member countries that are (unequally) represented in the Board can basically change the Articles. The World Bank's practice of interpretation makes it an instrument that is also less transparent.⁵³⁷ Why?

The Executive Directors have rarely ever issued a formal interpretation of a provision in the statute, but the Articles are instead adapted through informal or "implied interpretation".⁵³⁸ The Directors will discuss and approve a loan, an OP/BP suggested by Management, or a legal opinion prepared by the Bank's General Counsel – and given that they have the power of interpretation – their approval is considered to imply conformity with the Articles of Agreement. Through the formulation of OPs/BPs, the Bank's Management has thus actively contributed to the dynamic interpretation of the organization's mandate – just as the Bank's General Counsel has done through the preparation of legal opinions. Internal rule-making and legal opinions have also paved the way for the World Bank's evolving engagement in fragile states.

b) The Mandate in Light of Dynamic Interpretations

Besides the analogous organizational structure of the IBRD and the IDA, the Articles of Agreement determine their different purposes and functions. The IBRD was founded to assist in the "reconstruction and development" of war-torn European economies after the Second World War.⁵³⁹ Its major task consists in assisting middle-income and credit-worthy poorer countries in achieving sustainable growth and development through credit investments at discounted market rates and advisory services. In the two decades after its establishment, newly independent nations joined the ranks of sovereign states that had massively underdeveloped economies, and were

World Bank's preference of interpretation as a means of legal adaptation, ANDRES RIGO SUREDA, 'The World Bank and Institutional Innovation', in Edith Brown Weiss & Ibrahim F. I. Shihata (eds), *The World Bank, International Financial Institutions, and the Development of International Law*. (American Society of International Law, 1999).

⁵³⁷ See HASSANE CISSÉ, 'Should the Political Prohibition in Charters of International Financial Institutions be Revisited? The Case of the World Bank', in Hassane Cissé, et al. (eds), *The World Bank Legal Review. Volume 3. International Financial Institutions and Global Legal Governance* (The World Bank, 2012), 86.

⁵³⁸ On this practice of interpretation, see RIGO SUREDA, 'Informality and Effectiveness in the Operation of the International Bank for Reconstruction and Development', 593-595, explaining how the Bank has preferred "informal interpretations" of its mandate, "made possible by the fact that the organ approving new policies or operations has the power to interpret formally the Articles of Agreement."; ARON BROCHES, *Selected Essays. World Bank, ICSID, and Other Subjects of Public and Private International Law* (Martinus Nijhoff, 1995), chapter 2.

⁵³⁹ IBRD Articles, Art. I (i).

far from being creditworthy for IBRD borrowing. Consequently, the IDA was established in 1960 to complement the IBRD's activities in particular in the realm of development – an acknowledgment of the immensely different needs and capacities among the Bank's recipient countries.

The IDA is mandated to assist the poorest countries “to promote economic development, increase productivity and thus raise standards of living”.⁵⁴⁰ It provides countries where private or IBRD financing is not available with loans that come with zero or very low interest charges, or with grants that do not have to be reimbursed.⁵⁴¹ The IDA is thus more explicitly mandated to promote development, and only the highly concessional lending of the IDA actually qualifies as ODA.⁵⁴² Moreover, the IDA is the World Bank's principal arm and source of financing for fragile and conflict-affected countries.⁵⁴³

What “development” or “standards of living” means was left deliberately open in the Articles of Agreement. As the Bank's former General Counsel Roberto Dañino explained, the Articles have to be “examined against the back-drop of the current international legal regime and the evolving understanding of development”, an understanding that the organization is continuously challenged to refresh.⁵⁴⁴ While focused on economic growth in the beginning, today, the World Bank sees development as a comprehensive concept and all-encompassing goal, including a wide range of aspects related to socio-economic well-being and environmental sustainability.⁵⁴⁵ This understanding is captured in OP 1.00 on Poverty Reduction, which states the Bank's mission is poverty reduction, and defines poverty as a “lack

⁵⁴⁰ IDA Articles, Art. I.

⁵⁴¹ On the permissible use of IDA resources, see also IDA Articles, Art. V Sect. 1 (a), (b), (c). Eligibility and terms of repayment for IDA's lending are laid out in Annex D of OP 3.10, last updated in September 2013.

⁵⁴² On the OECD's definition of ODA, see *supra* note 51.

⁵⁴³ Of the 78 countries and territories eligible for IDA assistance in 2015, 26 are considered fragile. In addition, the World Bank's Harmonized List of Fragile Situations (*supra* note 1) includes two blend and three middle-income (i.e. IBRD-only) countries.

⁵⁴⁴ R. Dañino, Legal Opinion on Human Rights and the Work of the World Bank (Jan. 27, 2006), para. 3. The Bank's legal department accordingly understands itself as “problem-solver and innovator”, committed to “lawyering that is proactive, creative, flexible and responsive.” LEGAL VICE PRESIDENCY, The World Bank, 'Annual Report FY 2011: The World Bank and the Rule of Law' (2011), p. v, 10.

⁵⁴⁵ For an overview of the Bank's evolving development approaches and activities, see IBRAHIM F. I. SHIHATA, *The World Bank in a Changing World*, 2 (Nijhoff, 1995), pp. 33-70; or DEVESH KAPUR & DAVID VINES, 'The World Bank and Poverty Reduction: Past, Present and Future', in Christopher L. Gilbert & David Vines (eds), *The World Bank. Structure and Policies* (Cambridge University Press, 2000).

of opportunities (including capabilities), lack of voice and representation, and vulnerability to shocks.”⁵⁴⁶

The evolving understanding of development has also encompassed a growing acknowledgement of the inextricable link between peace, security, and development. We have seen that from the 1990s, the international community became increasingly concerned with civil wars and complex emergencies that deeply affected societal structures.⁵⁴⁷ Though largely absent from the high-risk environments of conflict-affected states in the decades following its establishment, the World Bank now sought a greater role in the international community’s efforts at post-conflict reconstruction, and could therefore rely on the purposes of “reconstruction and development” in the IBRD Articles.⁵⁴⁸

An interpretation of the Articles of Agreement was nonetheless necessary to clarify the boundaries of the Bank’s development mandate in the context of conflict and emergencies.⁵⁴⁹ In 2001, the Executive Directors approved Operational Policy 2.30 on Development Cooperation and Conflict, which confirms that violent conflict adversely affects the Bank’s development mandate, and establishes guiding principles for engagement in conflict-affected areas that are partly derived from the Articles.⁵⁵⁰ In addition, OP 8.00 on Rapid Response to Crisis and Emergencies of 2007 provides the basis for the Bank’s involvement in activities that may transgress the boundaries between development, humanitarian assistance, and security activities.⁵⁵¹ A Legal Opinion on “Peace-Building, Security, and Relief Issues” prepared by the General

⁵⁴⁶ Operational Policy 1.00 on Poverty Reduction (updated in July 2014), para.1. The Policy goes back to an Operational Directive first adopted in 1991, which was since revised several times to reflect the Bank’s evolving understanding of poverty.

⁵⁴⁷ *Supra* chapter I.2 a).

⁵⁴⁸ *Supra* note 539.

⁵⁴⁹ It became necessary not least when the World Bank increased its narrow focus on rebuilding infrastructure and began supporting demobilization and disarmament, community-based rehabilitation programs, and broader issues of governance in post-conflict countries. THE WORLD BANK, *The Role of the World Bank in Conflict and Development. An Evolving Agenda* (2004), 5.

⁵⁵⁰ See OP 2.30, paras. 1 and 3; and in detail *infra* section 3 a) of this chapter. The link between peace and development was first elaborated in the “Framework for World Bank Involvement in Post-Conflict Reconstruction”, endorsed by the Executive Directors in May 2007. The Framework provided the first conceptual and operational guideline for staff working in post-conflict situations, at a time when USD 400 million in grants had already been given to post-conflict countries and to support humanitarian operations of United Nations agencies. See THE WORLD BANK, *Post-Conflict Reconstruction. The Role of the World Bank* (1998), v.

⁵⁵¹ OP 8.00, approved by the Executive Directors on March 1, 2007, lists the activities that the Bank can pursue with an emergency operation. This includes support to partners in carrying out activities that fall outside of its own mandate, in order to bridge the gap between short-term relief and reconstruction activities (para. 5).

Counsel in 2007 confirms the broad lines established in both Policies.⁵⁵² Accordingly, the Bank can principally engage in activities related to peace-building, security, and relief issues, an important precondition for operating in the fluid environments of fragile states.⁵⁵³ The organization must, however, remain focused on its core economic competences (i.e. comparative advantages), and respect other provisions of the Articles.⁵⁵⁴ Rather than establishing a bright line-test, the Legal Opinion thus demands careful consideration of legal, operational, and reputational risks in each case.⁵⁵⁵

The two principal restrictions of the Articles that hence remain relevant in delineating the scope of the Bank's mandate are economic and efficiency requirements, and the political prohibition clause. Economy and efficiency requirements make up the so-called "fiduciary duty" of the World Bank. As noted before, they assume a prominent role in the legal framework of a "Bank" that strives to uphold its good credit ratings.⁵⁵⁶ The fiduciary duty provides the basis for a range of Bank policies in areas like procurement, financial management, disbursement, and anti-corruption. Notably, while the Bank has begun to reform these policies to move "from strict-rules to principles-based approach", and towards greater reliance on country systems (i.e. recipient laws and institutions), the underlying provisions in the Articles of Agreement have never been subject to a holistic interpretation.⁵⁵⁷

Further, we have seen that the Articles of Agreement, like the statutes of all MDBs, establish that the organization "shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned."⁵⁵⁸ The political prohibition clause applies to the

⁵⁵² Legal Opinion on Peace-Building, Security, and Relief Issues under the Bank's Policy Framework for Rapid Response to Crises and Emergency, prepared on request of the Committee on Development Effectiveness on March 22, 2007, and annexed to the Report "Toward a New Framework for Rapid Bank Response to Crises and Emergencies" (revised version R2007-001012, dated March 2007).

⁵⁵³ For instance, the Legal Opinion highlights the linkages between the United Nation's concept of peace-building and the Bank's own development mandate. See para. 12, referring to Boutros Boutros-Ghali's Agenda for Peace (*supra* note 117).

⁵⁵⁴ Legal Opinion on Peace-Building, Security, and Relief Issues, paras. 17-18.

⁵⁵⁵ Legal Opinion on Peace-Building, Security, and Relief Issues, para. 22.

⁵⁵⁶ IBRD Articles Art. III Sect. 5, lit. (b); IDA Articles Art. V, Sect. 1, lit (g). Moreover, IBRD Articles Art. I (i) state that the IBRD must direct its resources towards "productive purposes". The provision figures prominently in the *travaux préparatoires* of the Articles, and has been reiterated and concretized in World Bank policies ever since. On standards of effectiveness in the law of international development organizations in general, see *supra* chapter III.2.

⁵⁵⁷ As General Counsel Anne-Marie Leroy points out: LEROY, 'The Bank's Engagement in the Criminal Justice Sector and the Role of Lawyers in the "Solutions Bank": An Essay', 97.

⁵⁵⁸ It goes on: "Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I." IBRD

Executive Directors as well as the Bank's Management and staff. It contains two individual, but related aspects: the duty to refrain from interfering in the political affairs and be influenced by the political character of member states, and the requirement to ensure that only economic considerations are relevant to the organization's decisions.⁵⁵⁹

Certainly, a clear separation between political and economic spheres is not always possible. Starting with the 1990 Legal Memorandum of Ibrahim Shihata that clarified the permissible scope of engagement with good governance, the World Bank has increasingly recognized that political circumstances within a member country – perhaps rather than its “political character” *per se* – can have economic effects.⁵⁶⁰ To the extent they have a “direct and obvious” economic effect on the outcomes of Bank-funded operations, Shihata argues, the organization should be able to assess governmental institutions and their performance in deciding about loans.⁵⁶¹ In principle, the Bank can thus consider the structure, functioning, and effectiveness of national institutions, including in areas that belong to the core of political affairs.⁵⁶² The interpretation of governance as falling within the scope of the Bank's legal mandate thus constitutes another important stepping stone for the organization's involvement with state-building in fragile states.

Articles, Art. IV Sect. 10 and with almost identical wording, IDA Articles, Art. V Sect. 6. For an analysis and discussion of the meaning and significance of the political prohibition clause, see KILLINGER, *The World Bank's Non-Political Mandate*; and for a voice from within the Bank, CISSÉ, 'Should the Political Prohibition in Charters of International Financial Institutions be Revisited? The Case of the World Bank', pp. 59-92.

⁵⁵⁹ Moreover, the World Bank understands the clause to imply that it can only engage in a country upon the request of the government in power (*supra* note 275), and that it must be careful not to engage with actors outside of the government without its approval. This becomes clearer in THE WORLD BANK, 'Guidance Note on Bank Multi-Stakeholder Engagement', which provides guidance to staff on how to engage with a broad range of non-governmental actors, including parliaments, the media, civil society, the private sector, or community members.

⁵⁶⁰ Issues of 'Governance' in Borrowing Members: The Extent of their Relevance under the Bank's Articles of Agreement, Legal Memorandum of the General Counsel, dated December 21, 1990 (SecM91-131), at 79-85 (on mandate conformity), and 81-96 (on the delineation between permissible and impermissible activities). The Memorandum is reproduced in SHIHATA, *The World Bank Legal Papers*, chapter 10. The Memorandum informs the Bank's subsequent legal reasoning on governance issues, for instance, Shihata's Legal Opinion on the Prohibition of Political Activities in the Bank's Work, dated July 11, 1995 (SecM95-707). Moreover, it informs a number of key policy documents, like the Guidance Note on Multi-Stakeholder Engagement (June 2009); or the updated Governance and Anticorruption (GAC) strategy, endorsed by the Executive Board on March 27, 2012.

⁵⁶¹ See, for instance, the Legal Opinion of the General Counsel, dated 11 July 1995 (SecM95-707, July 12, 1995), reprinted in *ibid.*, 229. Shihata further argues that Bank-supported reform policies always depend on the existence of a “system which translates them into workable rules and makes sure they are complied with”, a system constituting “a basic requirement for a stable business environment; indeed for a modern state.” (p. 273).

⁵⁶² For an in-depth analysis of the mandate conformity of good governance-related activities the Bank undertakes, see KILLINGER, *The World Bank's Non-Political Mandate*.

Finally, since the World Bank was called upon “to position fragility, conflict, and violence at the core of its development mandate“ following the publication of the WDR 2011, the legal department has begun to develop a more elaborate approach to assessing risks and differentiating between permissible and impermissible activities on the basis of the Articles.⁵⁶³ In the 2012 “Legal Note on Bank Involvement in the Criminal Justice Sector”, the General Counsel therefore outlines a two-part test.⁵⁶⁴ First, activities should be grounded in an “appropriate and objective economic rationale”. Second, the risk of political interference should be carefully assessed and managed through a number of proposed measures, for instance, ensuring that activities are based on “a specific request or consent from the borrowing government”, are subject to a special review mechanism if they involve a high risk, and are closely monitored.⁵⁶⁵ The approach thus offers some decision-making parameters grounded in the Articles, while encouraging staff to carefully assess individual cases. At least in theory, it appears commensurate to the task of ensuring the World Bank remains a law-governed organization, even as it responds to the changing demands of the environment in which it operates.⁵⁶⁶

2. Definition and Classification of Fragile States in the Legal and Policy Framework

We have seen by now that the World Bank’s engagement with weak-capacity, poorly governed, and conflict-affected countries extends far beyond what the use of

⁵⁶³ The World Bank, Operationalizing the WDR 2011 (*supra* note 359), iii.

⁵⁶⁴ The Legal was issued by General Counsel Anne-Marie Leroy on February 9, 2012. For an overview of the Bank’s growing involvement with justice sector reforms in fragile states, see KLAUS DECKER, ‘World Bank Rule-of-Law Assistance in Fragile States: Developments and Perspectives’, in Amanda E. Perry (ed) *Law in the Pursuit of Development. Principles into Practice?* (Routledge, 2010), pp. 228-232.

⁵⁶⁵ On the economic rationale, see paras. 17-24 of the Legal Note; on the country ownership as a threshold step to avoid political interference, para. 28; and on the assessment of legal risks in three categories, paras. 31-34. At the time of writing, the legal department was considering a further legal note that would take a similar approach in outlining the permissible scope of Bank involvement with security-related activities. For a preview, see LEGAL VICE PRESIDENCY, The World Bank, ‘*Annual Report FY 2014. Legal Aspects of the World Bank’s Involvement in the Security Sector*’ (2014), vii-x.

⁵⁶⁶ One could question, however, why the World Bank adopts such a considerate approach when it comes to justifying increasing involvement in justice- and security-related activities, while it insists on a rather bright line approach to determine that human rights are beyond its mandate. One explanation is that the political prohibition clause serves an important function for the Bank, namely, to prevent a “creeping politicization” or over-ambiguous expansion of its original development mandate. Arguably, the Bank uses this function at its discretion. On the role of the political prohibition in the evolution of the Bank’s mandate, CISSÉ, ‘Should the Political Prohibition in Charters of International Financial Institutions be Revisited? The Case of the World Bank’, 81.

the “fragile states” terminology suggests. Many of the challenges that were eventually associated with fragile states had preoccupied the Bank already in the 1990s, when it became more involved in post-conflict countries.⁵⁶⁷ When the organization began addressing the particular challenges of countries with weak institutions, policies, and governance more systematically in 2001, it referred to “low-income countries under stress”.⁵⁶⁸ Only in 2008 did the Bank officially endorse the fragile states terminology – by now, it prefers to speak of “fragility” or “fragile situations”.⁵⁶⁹

Still, it is important to ask how the World Bank defines and classifies fragile states, not least since its “Harmonized List of Fragile Situations” has become a habitual reference point in the development community.⁵⁷⁰ Definition and classification reflect the organization’s understanding of the ‘problem’, and may also shape its response. What consequences automatically attach to the term fragile state under the World Bank’s legal and policy framework? Could “fragile state” qualify as a regime-specific, legal term?

In this section, I briefly describe the criteria and process of the Country Policy and Institutional Assessment (CPIA), an indicator-based, diagnostic tool that the Bank uses to classify fragile states (a). Next, I examine the consequences attached to the classification under the World Bank’s legal and policy framework. I show that the classification can have important signaling effects far beyond the organization, while it is grossly inadequate and out of sync even with the Bank’s own, evolving understanding of fragility. Its role in determining the Bank’s operational response and resource allocation to fragile states is, however, mostly informal (b).

⁵⁶⁷ See, for instance, THE WORLD BANK, *Post-Conflict Reconstruction. The Role of the World Bank*, 5, defining conflict-affected countries with reference to situations “where the state has failed”, identifying “limited government capacity, fragile political balances, and extreme time pressures” as characteristic challenges. In 2007 the Bank officially merged its post-conflict and fragile states agenda.

⁵⁶⁸ The LICUS initiative was the first time the Bank used an official designation for countries with weak governance and institutions, which were classified on the basis of their (low) score in the Country Policy and Institutional Assessment (CPIA). LICUS countries were further distinguished in four groups: countries experiencing deterioration; countries facing prolonged political crisis or impasse; post-conflict countries or countries in political transition; and countries experiencing gradual improvement. See, for instance, the THE WORLD BANK, *Good Practice Note for Development Policy Lending. Development Policy Operations and Program Conditionality in Fragile States*.

⁵⁶⁹ *Supra* note 356.

⁵⁷⁰ *Supra* note 16.

a) The CPIA-Based Classification – Criteria and Process

Various types of World Bank documents express how the organization understands the notion of fragile state or situations, mostly for analytical purposes.⁵⁷¹ More decisive for the overall volume and types of development assistance a country receives from the Bank is the classification of fragile states on the basis of the Country Policy and Institutional Assessment (CPIA). Based on the CPIA, “fragile situations” are officially defined as having either a composite World Bank, AfDB and ADB rating of 3.2 (out of 6) or less, or the presence of a United Nations and/or regional peace-keeping or peace-building mission during the past three years, not including border monitoring missions.⁵⁷² Post-conflict countries are thus addressed as a sub-group of fragile states.⁵⁷³ The Bank’s list of all countries and territories classified as fragile is updated once a year and publically available on its website.

In contrast to numerous other indicators used to classify and rank fragile states, for instance, based on the state’s capacity to deliver certain core functions, the CPIA was not designed to measure fragility.⁵⁷⁴ Quite the contrary, the Bank primarily uses the CPIA to determine how favorable the political and structural environment of a country is to the effective use of aid – where aid is likely to reach development outcomes, and what channels and instruments of aid are therefore most appropriate. The 16 criteria that make up the CPIA country score essentially reflect what the World Bank requires from a state with good policies and institutions, i.e. the “good governance state”.⁵⁷⁵ In using the CPIA to classify fragile states, the Bank frames

⁵⁷¹ See, for instance, the THE WORLD BANK, 'Good Practice Note for Development Policy Lending. Development Policy Operations and Program Conditionality in Fragile States', para. 3, according to which “fragile states are characterized by weak policies, institutions and governance, and may be in conflict or at risk of conflict, resulting in poor economic and poverty reduction performance.”; or the definition in the WDR 2011, quoted in *supra* note 148.

⁵⁷² Information Note: The World Bank’s Harmonized List of Fragile Situations’, available online: http://www.worldbank.org/content/dam/Worldbank/document/Fragilityandconflict/FragileSituations_Information%20Note.pdf (accessed December 2014). The Note was only added to the Bank’s website in 2014, arguably to enhance transparency following an increasing acknowledgement of the classification’s significance, and of its limitations.

⁵⁷³ Almost two-thirds of the countries included on the Bank’s list of fragile situations in 2015 had the presence of either a peace-building or peace-keeping mission. Though the automatic inclusion of post-conflict countries in the list of fragile situations was considered to be useful for identifying fragility at the sub-national level, except for Burundi, Côte d’Ivoire, Kosovo, Liberia, Mali, and Sierra Leone, all post-conflict countries also have a (country-wide) CPIA score of 3.2 or below. Countries or territories that are on the list without an available CPIA score are the West Bank & Gaza, and Bosnia-Herzegovina, Iraq, Libya and Syria, for which no CPIA score is published since they are IBRD and not IDA-eligible countries. See The World Bank, Harmonized List of Fragile Situations (*supra* note 1).

⁵⁷⁴ *Supra* chapter II.1.

⁵⁷⁵ MICHAEL RIEGNER, Global Administrative Law Working Papers 6/2012, 'Measuring the Good Governance State: A Legal Reconstruction of the World Bank’s “Country Policy and Institutional

fragility as a mathematical difference of the ideal of good governance expressed therein.

The assessment criteria of the CPIA are contained in the so-called CPIA Questionnaire, an internal document that does not follow a particular form under the Bank's secondary law. The 16 criteria are grouped into four clusters, which intend to cover all determinants that have a positive correlation with economic growth: economic management, structural policies, policies for social inclusion and equity, and public sector management and institutions.⁵⁷⁶ The same Questionnaire is used for all countries regardless of their particular conditions and challenges. A certain measure of country specificity can be taken into account, however, and countries with particularly weak institutions and policies be ranked higher than they otherwise would.⁵⁷⁷

The conduct of CPIA assessments follows an internal administrative practice that is laid out in the Questionnaire effective at a time, not an Operational Policy. All CPIA ratings are conducted by staff, who make subjective judgments based on country knowledge, analytical work and policy dialogue, information provided by partners, and publicly available indicators.⁵⁷⁸ Government representatives from the countries assessed only need to be consulted when Bank staff prepare their initial ranking proposals, and are later informed of the CPIA score and its implications for the Bank's operations. The final CPIA score of all IDA-eligible countries are

Assessment''' (2012). For a critique of the World Bank's approach to good governance, see MICK MOORE, 'Declining to Learn from the East? The World Bank on 'Governance and Development'', 24 *IDS Bulletin* (1993), arguing that it is very much shaped by a liberal-pluralist paradigm and a Western model of political and social order.

⁵⁷⁶ The CPIA 2011 Questionnaire is available online:

<http://www.worldbank.org/ida/papers/CPIAcriteria2011final.pdf> (accessed December 2014). The CPIA criteria have been revised several times in order to reflect changing development paradigms over time, for instance concerning the role of the state.

⁵⁷⁷ In determining CPIA scores, staff are advised to take into account that different policies and/or institutions can generate similar development outcomes. The Questionnaire further asks staff to take into account a country's development stage in implementing the guidelines (CPIA 2011 Questionnaire, para. 17). The IEG's 2009 review of the CPIA criticizes this qualification, since it is subjective and has been used very differently across the Bank. INDEPENDENT EVALUATION GROUP, The World Bank, *The World Bank's Country Policy and Institutional Assessment* (June 30, 2009), paras. 3.35-3.43.

⁵⁷⁸ CPIA 2011 Questionnaire, paras. 8-9, 15. During the first phase, the Benchmarking Phase, a representative sample of countries from all regions is selected and assessed. Their scores serve as an anchor for the relative ranking of all other countries. Country teams propose ratings for each of the 16 criteria and provide a written justification (the "write-ups"), which are subjected to several internal reviews by different departments of the Bank. In the Second Phase, all other countries are ranked according to a similar process of country team proposals and Bank-wide review, and using the benchmark countries as guideposts to help ensure consistency within and across regions.

published, but no information on the preceding deliberation process is made available.⁵⁷⁹

There is thus little room for national authorities to participate in the ranking, to contest its results, or to contribute to the development of the CPIA criteria in the first place. Particularly countries with weak capacities are restricted in their ability to follow, influence, or challenge the CPIA process whereby they are classified as “fragile”. This is on purpose. By minimizing avenues of political influence on the assessment process, the Bank aims to safeguard the objectivity of knowledge production, and of the decisions taken on that basis. But what are the consequences attached to the CPIA score and classification as fragile state?

b) Consequences for Operational Decision-Making, Resource Allocation, and Beyond

In general, the CPIA serves two main functions. First, it is a source of knowledge that the Bank relies on for operational decision-making at various stages of planning and implementing development projects.⁵⁸⁰ The CPIA thus constitutes an avenue through which considerations of a government’s institutions and policies influence how the organization decides to engage with a country. This influence is largely informal. Second, the CPIA informs the performance-based allocation of resources between IDA-eligible countries, with those countries with a higher score receiving a higher per-capita allocation.⁵⁸¹ Countries with good governance are thus rewarded.⁵⁸²

⁵⁷⁹ Documents that furnish information on the deliberation process such as the write-ups are not publically available for scrutiny, since they fall under an exemption in the World Bank’s Policy on Access to Information (July 1, 2010), para. 16 lit. c.

⁵⁸⁰ For instance, staff refer to the CPIA when preparing the Country Partnership Framework (CPF, formerly Country Assistance Strategy), the principal programming tool wherein the Bank analyzes a country’s development challenges and determines the level and instruments of its support. They also rely on the CPIA when deciding on a country’s eligibility for direct budget support, with countries that score low being less likely to receive budget support.

⁵⁸¹ Next to the CPIA score, a country’s performance in implementing Bank-financed operations enters into the equation. The so-called Project Performance Ratings of fragile states are on average lower than those of other countries, but the gap has recently become smaller (CHANDY, *Ten Years of Fragile States. What Have We Learned?*, 8). The performance ranking is again adjusted to reflect a country’s needs in terms of population size and GNI per capita.

⁵⁸² How a country scores in the CPIA’s governance-related criteria is counted more than other criteria in the IDA’s allocation formula, which accordingly rewards good governance. IDA’s Performance-based Allocation System is thus an immediate expression of the aid orthodoxy that well-governed and capable institutions are a precondition for aid effectiveness. See *supra* chapter II.2 a).

This effect is formal, in that the equation that makes the CPIA a determining factor in allocating IDA's resources is included in a legally binding resolution.⁵⁸³

Both of these functions the CPIA assumes for all IDA-countries, whether fragile or not. To get to the role of the classification of fragile states under the World Bank's legal and policy framework, we need to look closer at the specific consequences attached to the classification of countries as fragile based on a CPIA score of 3.2 or less.

Indeed, the World Bank has recently started referring to "fragile states" or "fragility" in binding OPs/BPs, namely OP 9.00 on Program-for-Results Financing and OP 10.00 on Investment Project Financing.⁵⁸⁴ Under OP 10.00 on Investment Project Financing, countries experiencing "fragility" may be subject to "specific policy requirements and special consideration". As I analyze in detail below, this means that staff must refer to the list of fragile states when deciding on the use of special arrangements for project lending.⁵⁸⁵ However, a country's CPIA score is not the only factor that staff need to consider, nor does a CPIA score lower than 3.2 mean that a country automatically qualifies for such special arrangements. OP 9.00, in turn, mentions "fragile states" without attaching any operational consequences. Accordingly, the CPIA-based classification of fragile states does not have formal consequences for the Bank's operational decision-making.

Looking at the role of the CPIA in the allocation of IDA's resources, it is clear that with their score below 3.2, fragile states by definition receive a smaller share. Again, the material effect of the CPIA is not specific, though particularly severe for fragile states – it entails that countries with the highest needs may receive the lowest levels of aid allocations. To alleviate this effect, the IDA's member states have formally approved a number of exceptions to the performance-based allocation system. Are these exceptions addressed to fragile states?

In the past, exceptional allocations were made available to a broadly defined category of post-conflict countries, countries "re-engaging" with the IDA after a long

⁵⁸³ A legally binding Resolution is by the Board of Governors every three years on the occasion of the Replenishment meetings. See THE WORLD BANK, *'Additions to IDA Resources: Sixteenth Replenishment - IDA 16: Delivering Development Results'*, Annex 2.

⁵⁸⁴ OP 9.00 on Program-for-Results Financing (February 2012), at para. 8 lit. (f); and OP 10.00 on Investment Project Financing (April 2013), at para. 11, together with BP 10.00, paras. 11 and 14.

⁵⁸⁵ *Infra* chapter IV.4 a).

period of (politically) disrupted relations, and countries in arrears.⁵⁸⁶ This “piece-meal approach” was subsequently found too “complex, opaque and prone to arbitrariness”.⁵⁸⁷ In fact, additional funding remained relatively concentrated on a small number of countries, and on post-conflict reconstruction rather than prevention activities.⁵⁸⁸

To make additional financing available to countries that are considered fragile, though they have not necessarily experienced conflict or accumulated significant arrears, a new exceptional allocation regime was introduced in 2014.⁵⁸⁹ The new regime still does not allocate extra resources to countries based on their CPIA-based classification as fragile, but to countries facing “turn-around” situations. Closely aligned with the findings of the WDR 2011, a “turn-around” situation is defined as a “critical juncture in a country’s development trajectory providing a significant opportunity to building stability and resilience”.⁵⁹⁰ Among other, countries can qualify for funding if there has been “major shift in a country’s policy priorities addressing critical elements of fragility.”⁵⁹¹ Besides, the State-and Peace-Building Fund provides extraordinary financing for projects in “fragile, conflict-prone, or

⁵⁸⁶ THE WORLD BANK, *'Additions to IDA Resources: Sixteenth Replenishment - IDA 16: Delivering Development Results'*, Annex 2 para. 8, providing for exceptional allocations to „countries emerging from severe conflict“ (special post-conflict allocations); „countries re-engaging with IDA after a prolonged period of inactivity“; countries „in the aftermath of severe natural disasters or economic crises“, and countries qualifying for pre-arrears clearance (according to OP 13 para 1, lit. b), the Bank is usually prohibited from lending to countries in arrears). These exceptions are in the same document as the allocation formula that receives binding legal effect through adoption in a Board of Governors resolution. On the meaning of these categories and their relation to the group of fragile states, see RACHEL FOLZ & MANUELA LEONHARDT, Gesellschaft für Internationale Zusammenarbeit (GIZ), *'The Engagement of the International Development Association in Fragile States. Proposals for a Reform Agenda'* (April 2012), 13.

⁵⁸⁷ See THE WORLD BANK, *'IDA 17. IDA's Support to Fragile and Conflict-Affected States'*, paras. 42-55, at para. 44.

⁵⁸⁸ For instance, in the fiscal year of 2009, USD 1.049 were allocated to nine post-conflict states, USD 118 million to three re-engaging states, and only USD 228 million to 21 other fragile states. See THE WORLD BANK, *'IDA15 Mid-Term Review. IDA's Support to Fragile and Conflict-Affected Countries: Progress Report 2007-2009'* (November 2009), pp. 24-25.

⁵⁸⁹ It is too early to judge whether the new regime will lead to a more predictable and transparent allocation of exceptional resources to fragile states. At least on paper, the new eligibility criteria still look rather vague, and potentially prone to political selectivity.

⁵⁹⁰ THE WORLD BANK, *'Implementation Arrangements for Allocating IDA Resources to Countries Facing "Turn-around" Situations. Background Note'* (October 2013), para. 9. A “turn-around” situation can be marked either by the end of conflict, or “the commitment to a major change in the policy environment”. The definition of conflict is relatively broad, including international conflict, civil war, as well as “cycles of violence that significantly disrupt a country’s development prospects”.

⁵⁹¹ The Bank’s Management, under the oversight of the Executive Directors, decides on a country’s eligibility on the basis of an eligibility note, in which Bank staff lay out how a country meets the eligibility criteria. *Ibid.*, para. 12. Besides, to guide the allocation of additional resources between those countries qualifying for exceptional allocations, the IDA uses a “Post-Conflict Performance Indicators” (PCPI) Framework, which functions similar to the CPIA, but with criteria more sensitive to security-related development challenges.

conflict-affected” countries, i.e. including countries not classified as fragile, though those with a low CPIA score are given priority.⁵⁹² In sum, inclusion on the Bank’s list of fragile states *per se* does not give a country access to additional financing, though the mentioned exceptions have certainly benefited fragile states.

The CPIA-based classification of fragile states thus does not automatically enjoin the World Bank as a matter of law on how to engage with a country. The organization has refrained from using “fragile state” as a regime-specific legal term, in the sense of attaching formal consequences to its application, or creating a specific category of member state.⁵⁹³ We will see in the following sections that the organization has adapted its legal and policy framework to cope with specific circumstances (e.g. weak capacity) or situations (e.g. conflict) associated with fragile states, but mostly without referring to the CPIA-based classification.

Even if not legal consequences, the Bank’s CPIA-based classification of fragile states can still have significant reputational and political effects. It is increasingly acknowledged that indicator-based assessments and rankings like the CPIA have the potential to considerably impact on individual or collective behavior, political decision-making, and on perceptions more broadly.⁵⁹⁴ Where indicators are used for evaluating the performance of state institutions, they make implicit assumptions on the appropriate standards against which to measure effective statehood or governance. Seen in this light, the Bank’s classification of fragile states concretizes, stabilizes and to a certain extent enforces the normative standards the Bank puts to the “good

⁵⁹² Resolution Establishing the SPF (*supra* note 353), para. 18 (Eligibility Criteria) and para. 3.

⁵⁹³ Notably, judged on the basis of the legal principle of sovereign equality, international development organizations can (and often do) define or categorize certain groups of recipient countries for various purposes, as long as their equal legal status is maintained. On the legal boundaries concerning the classification of states under international law, see PETRA MINNEROP, 'The Classification of States and the Creation of Status within the International Community', 7 *Max Planck Yearbook of United Nations Law*, 79 (2003); and on differentiation between recipient countries in the law of development cooperation, DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 207-209.

⁵⁹⁴ In recent years, international legal scholars have hence begun addressing indicators as a “technology of global governance” and sought to conceptualize the effects of indicators in terms of an exercise of international public authority, or “governance by information”. See, for instance, DAVIS, et al., 'Indicators as a Technology of Global Governance'. The authors agree with von Bogdandy and Goldmann that indicators can constitute a form of “governance by information” that may raise concerns in terms of transparency, participation and review. ARMIN VON BOGDANDY & MATTHIAS GOLDMANN, 'The Exercise of International Public Authority through National Policy Assessment. The OECD’s PISA Policy as a Paradigm for a New International Standard Instrument', 5 *International Organizations Law Review*, 241 (2009). See also *supra* chapter II.1.

governance state”.⁵⁹⁵ Since several other donor institutions use the Bank’s list as a basis for determining fragility, such effects are amplified beyond the organization.⁵⁹⁶

This is while even the World Bank has come to acknowledge the gross mismatch between the CPIA-based classification and its own, increasingly sophisticated understanding of fragility – a mismatch that renders the classification of limited diagnostic and predicative value. The Bank describes fragility as a development challenge of a different kind, not merely degree, and one that does not concern the capacity of formal state institutions alone.⁵⁹⁷ Based on the CPIA, however, fragile states are countries with policies and institutions that are little conducive to economic growth, or a poor track record in implementing Bank projects – they essentially equate with least-developed countries.⁵⁹⁸ The CPIA does not allow capturing the existence of regionally confined fragile situations, either. And with its focus on formal policies and institutions, it cannot reflect how informal, traditional institutions may assume a considerable role in fulfilling state functions.⁵⁹⁹

In line with the recommendations of a 2013 IEG evaluation, the World Bank has therefore set out to develop a “more suitable and accurate mechanism” to define fragile states.⁶⁰⁰ What role such a definition should play in deciding how the Bank

⁵⁹⁵ Aid-dependent states in particular could be pressured to introduce policy and institutional changes to comply with these standards in order to access financing according to the terms of IDA’s Performance-based Allocation system. Whether or not the categorization of fragile states on the basis of the CPIA constitutes an act of “governance by information” or exercise of public authority, however, is controversial, not least because the effects of the categorization and the extent to which it unilaterally determines or compromises the liberty of the addressee are difficult to establish. See RIEGNER, *Measuring the Good Governance State: A Legal Reconstruction of the World Bank’s “Country Policy and Institutional Assessment”*, 10.

⁵⁹⁶ For instance, for its annual report on resource flows to fragile and conflict-affected states in 2014, the OECD relied on the harmonized list of fragile states put together by the World Bank, AfDB, and ADB, in combination with the 2013 Failed State Index. The European Union in turn relied on the OECD’s combined list in EUROPEAN COMMISSION & EUROPEAN UNIVERSITY INSTITUTE, *European Report on Development. Overcoming Fragility in Africa. Forging a New European Approach*. The AfDB and the ADB have adopted the Bank’s model of defining fragile states on the basis of their CPIA score, although they conduct their own CPIA.

⁵⁹⁷ See the WDR’s definition of fragility, quoted in *supra* note 148.

⁵⁹⁸ Of the 32 countries or territories that the World Bank in 2015 considers fragile based on their CPIA score, only 8 were not also Least Developed Countries (LDCs) according to UNCTAD’s official classification of “states that are deemed highly disadvantaged in their development process” (on the criteria and process of UN recognition of LDCs, see online, <http://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/UN-recognition-of-LDCs.aspx>, accessed November 2014). Since the events of the Arab Spring have drawn attention to the fragility of middle-income countries, however, the World Bank has begun to add middle-income countries, namely Iraq, Libya, and Syria, to its list of fragile situations. World Bank, Harmonized List of Fragile Situations (*supra* note 1).

⁵⁹⁹ See *supra* chapter I.2 b) on the role of non-state actors in fulfilling traditional state functions.

⁶⁰⁰ INDEPENDENT EVALUATION GROUP, *World Bank Assistance to Low-Income Fragile- and Conflict Affected States*, 128.

engages with fragile states is, however, controversial. Should it act as a formal trigger for either a differentiated approach to planning and implementing development cooperation, or for allocating extra resources? On the one hand, a clear definition could perhaps add transparency and consistency to the Bank's engagement with fragile states, and provide the basis for a more systematic approach.⁶⁰¹ If so, given what significant consequences it would have, the process of classifying fragile states would need to be made more transparent and inclusive than the CPIA process at present.⁶⁰² On the other hand, the danger is that a clear definition would provide the Bank's decision-making only with "an allure of sophistication while absolving actors of the need to engage substantively with the detailed idiosyncrasies of marginal or specific cases".⁶⁰³ After all, it also remains controversial whether fragile states have something in common that defines them as substantially different from other Bank member countries – and whether these differences can be described clearly enough to trigger automatic conclusions for the Bank's response.

3. Juridical Statehood and Dealings with (In)Effective Government

We have seen that the World Bank's legal and policy framework rests on a state-centric development paradigm, and the organization is accordingly attuned to dealing with official government counterparts – as interlocutors, signatories, and owners of the development process.⁶⁰⁴ The political prohibition clause thereby defines to what extent the organization can consider the structure or performance of government institutions.⁶⁰⁵

⁶⁰¹ The following sections will show that the Bank's approach is not very systematic at present. See also FOLZ & LEONHARDT, *The Engagement of the International Development Association in Fragile States. Proposals for a Reform Agenda*, 15, arguing that a definition of fragility would constitute "[a] first step towards systematising the access of fragile states to IDA funding".

⁶⁰² Over the last years, the CPIA process has already become increasingly being structured, and mechanisms have been designed to ensure a certain level of transparency, reason-giving, and review. With concrete proposals on how to increase the process' conformity with such standards known from domestic administrative law, see RIEGNER, *Measuring the Good Governance State: A Legal Reconstruction of the World Bank's "Country Policy and Institutional Assessment"*, 17-21.

⁶⁰³ MICHAEL WOOLCOCK, UNU WIDER Working Paper 2014/097, *Engaging with Fragile and Conflict-affected States. An Alternative Approach to Theory, Measurement and Practice* (July 2014), 4.

⁶⁰⁴ See *supra* chapter II.2 a) on the state-centric paradigm of development cooperation, and chapter III.2. on the protection of recipient sovereignty in the legal and policy framework of international development organizations, including the World Bank.

⁶⁰⁵ *Supra* section 1 b) of this chapter.

With its growing involvement in conflict-affected and fragile states, the World Bank has increasingly faced situations where an effective government counterpart in a formal, juridical sense could not be identified. Protracted crises and outright conflicts quite often entail a partial breakdown of government authority, if not the temporary absence of government counterparts, for instance in post-war Afghanistan or Iraq. In Somalia, the prolonged absence of any reasonably effective government prevented the Bank from engaging for more than a decade, despite the country's enormous development needs.⁶⁰⁶ Disorderly transfers of power in the context of conflicts or political turmoil can also raise doubts as to the effectiveness or legitimacy of unelected, interim authorities – or lead to a situation where more than one entity claims to be the government in power. Such doubts can delay Bank assistance when it appears most needed. Besides, in post-conflict situations involving the dissolution of states, not just the legal status of a government, but also that of (member) states or their dissolving units can be in question, like in Kosovo or South Sudan. Aid effectiveness concerns are thus very much bound up with the settlement of legal questions that, broadly speaking, pertain to the identification of effective government counterparts in a formal, juridical sense.⁶⁰⁷

In dealing with such a complex reality and the political questions it invariably entails, the World Bank has not only sought *ad hoc* solutions to work around the constraints posed by its legal and policy framework, which makes juridical statehood a minimum condition for development cooperation. The Bank has consolidated its evolving, organizational practice through the adoption of internal rules. These rules reflect how the organization seeks to strike a balance between the political prohibition clause, its fiduciary duty as a creditor, and the need to assist in the development and reconstruction of fragile states in concert with the international community.

In this section, I describe and analyze the two internal rules that together determine the World Bank's approach to the legal obstacles it faces in countries that

⁶⁰⁶ The World Bank disengaged in 1991 when Somalia stopped paying its debts, and remained disengaged for more than a decade, due to the continuous insecurity but mostly the lack of a fully functioning government. Somalia's development and humanitarian indicators are among the lowest in the world. See, for instance, UNDP, *'Somalia Human Development Report 2012: Empowering Youth for Peace and Development'* (2012), 26-32.

⁶⁰⁷ On the problems for Bank engagement in situations of severe political crisis, disorderly transfers of power, state dissolution, or state failures, see already ROBERT MUSCAT, *The World Bank, 'Conflict and Reconstruction. Roles for the World Bank'* (1995), chapter 2; and the summary of Board discussions on the Bank's evolving engagement in post-conflict reconstruction, in THE WORLD BANK, *'The Role of the World Bank in Conflict and Development. An Evolving Agenda'*, 6-8.

have no government, or where an official government cannot easily be identified. Operational Policy 2.30 on Development Cooperation and Conflict essentially redefines on what legal grounds the Bank can engage in case there is no government, and in non-member states or territories with an unresolved legal status (a). Operational Policy 7.30 on Dealings with De Facto Governments establishes under what conditions the Bank decides to engage with a *de facto* government, including in countries emerging from conflict (b). I conclude by analyzing the World Bank's approach as evident from the two Policies, and evaluate its outcomes in terms of balancing the objective of development, standards of effectiveness, and the protection of recipient sovereignty in the Articles of Agreement (c).

a) Operational Policy on Development Cooperation and Conflict – State Consent and Community Interests

i. Background and Precedents

In the 1990s, the World Bank sought a more proactive role in the reconstruction and development of post-conflict countries.⁶⁰⁸ Many times, however, an unresolved legal status or the absence of an effective and internationally recognized government made it difficult for the Bank to engage on the basis of the Articles. Even the UN Secretary General recognized the typical restrictions that international development organizations face in such settings – and consequently asked for ingenuity and flexibility in handling their respective legal provisions.⁶⁰⁹

The World Bank was first challenged to prove its ingenuity when it was asked by the cosponsors of the Oslo peace process to provide assistance to the West Bank and Gaza. The dire economic situation in the Palestinian Territories left no doubt as to the humanitarian need for engagement, but even after the establishment of an interim self-

⁶⁰⁸ For a detailed account of the Bank's evolving post-conflict work, see JOHN D. CIORCIARI, 'Prospective Enlargement of the Roles of the Bretton Woods Financial Institutions in International Peace Operations', 22 *Fordham International Law Journal*, 292 (1998), 297 ff.; PIETER VAN HOUTEN, 'The World Bank's (Post-)Conflict Agenda: The Challenge of Integrating Development and Security', 20 *Cambridge Review of International Affairs*, 639 (2007); and on the Bank's incentives and motivation for taking up post-conflict work, see IRFAN NOORUDDIN & THOMAS EDWARD FLORES, 'Financing the Peace: Evaluating World Bank Post-Conflict Assistance Programs', 4 *Review of International Organizations*, 1 (2009), 7-8.

⁶⁰⁹ Report of the Secretary-General on the Situation in Somalia, UN-Doc. S/1999/882 (16 August 1999), para. 72. See also the Report of the Panel on United Nations Peace Operations ("Brahimi Report") presented to the Secretary General on 21 August 2000 (UN-Doc. A/55/305-S/2000/809), paras. 45-46, which explicitly called on international financial institutions to assume a role in the international community's post-conflict reconstruction efforts.

governing arrangement, they were neither a sovereign state, nor part of a member state's territory.⁶¹⁰ The Bank's Articles of Agreement establish that the organization can provide financing only for projects or programs in the territory of a member state.⁶¹¹ Its resources are to be used "exclusively for the benefit of members."⁶¹² Accordingly, there appeared to be no legal basis for the extension of loans.

In this context, General Counsel Ibrahim Shihata argued that the Bank could provide assistance to the West Bank and Gaza if the Executive Directors, who are competent to render an interpretation of the Articles, approved such engagement on the grounds that it was "for the benefit of members".⁶¹³ The Executive Directors passed a Resolution to confirm that due to the significant consequences of the economic circumstances of the Palestinian Territories for the Middle East peace process and development, the Bank's involvement was in the interest of the organization's membership as a whole.⁶¹⁴

Though the organization was thus authorized to provide assistance, it could not provide loans, which still required the existence of a government capable of assuming legal responsibility for reimbursement. Therefore, two trust funds were established, one with resources from the Bank, and one with resources from various donors.⁶¹⁵

⁶¹⁰ Ever since the war in 1967, the Bank had treated the West Bank and Gaza as "occupied territories" and refused Israel's requests to engage "until such time as the legal status of such territories had been internationally decided and hostilities therein had ceased". SHIHATA, *The World Bank in a Changing World*, Legal Aspects of the World Bank's Assistance to the West bank and the Gaza Strip, p. 362-363.

⁶¹¹ This requirement is implicit in IBRD Articles I lit. i), Art. III Sect. 1 lit. i) and v), Art. IV Sect. 3 lit. a) and c) and Art. V Sect. 7, as well as in the IDA Articles, Art. I (Purposes) and Art. V Sect. 1 lit. a). In contrast to the IBRD, the IDA can also provide financing to a dependent or associated territory within the meaning accorded to Art. V Sect. 1, but the Bank did not recognize the West Bank and Gaza as such.

⁶¹² IBRD Articles, Art. III Sect. I lit. a).

⁶¹³ On the Shihata's legal reasoning in detail, see IBRAHIM F. I. SHIHATA, et al., 'Legal Aspects of the World Bank's Assistance to the West Bank and the Gaza Strip' *The Palestine Yearbook of International Law*, 19 (1992). The Bank had used the same reasoning before, in order to provide technical assistance to countries that had applied for membership, e.g. to the Soviet Union in 1991. The case of the West Bank and Gaza was more complicated, however, since its legal status could not be expected to be resolved soon, permitting full accession to membership of the World Bank.

⁶¹⁴ Resolution of the Executive Directors of the IBRD No. 93-11 and Resolution of the Executive Directors of the IDA No. 93-7 establishing a Trust Fund for Gaza (October 19, 1993). A further Resolution No. 483 (November 11, 1993) adopted by the Board of Governors approved the transfer of IBRD surplus to the Trust Fund.

⁶¹⁵ The Trust Fund for Gaza was primarily financed from IBRD surplus, i.e. funds that the Bank has generated on the capital markets, rather than received from member states, and which it has more discretion in using. The Holst-Fund was a multi-donor trust fund that provided an extra USD 265 million to cover the start-up and recurrent costs of the PLO. The Holst Fund was formally managed by the PLO, but in light of the severely restricted capacities of the nascent Palestinian administration, under the close scrutiny of an international accounting firm hired by the World Bank. See THE WORLD BANK, *Post-Conflict Reconstruction. The Role of the World Bank*, p. 38. On the legal bases of trust funds in general and the contractual relationships with donors and trustees, see Ilias Bantekas, *Trust*

Trust funds are largely autonomous funding mechanisms, where contributions from one or more donors are held in trust by an administrator, a task assumed by the IDA.⁶¹⁶ Being separate from the Bank's normal lending, trust funds provide greater flexibility regarding the use of funds and the recipients of aid, for instance, countries in arrears to the Bank, non-member countries, or in this case, territories with an unresolved legal status.⁶¹⁷ As a trust fund administrator, the Bank still had to conclude grant agreements with the Palestinian Liberation Organization (PLO), but these grant agreements concerned only the implementation of grant-financed projects, not the legal commitment to reimburse loans.⁶¹⁸ Grants are non-reimbursable, so that the Bank was released from the fiduciary duties associated with ensuring the repayment of loans.⁶¹⁹ With the authorization of the Executive Directors and through the use of trust fund arrangements, the World Bank ultimately provided assistance to a non-member territory with an unresolved legal status, and instead of a *de jure* government, to the PLO.

The organization subsequently relied on the same legal reasoning and a similar trust fund arrangement to become engaged in Bosnia, where the US administration under President Clinton sought a decisive role for the Bank in post-conflict reconstruction.⁶²⁰ Both cases paved the way for the organization's growing operational engagement in fragile states, and became important legal precedents.⁶²¹

Funds under International Law. Trustee Obligations of the United Nations and International Development Banks (TMC Asser Press, 2009), chapter 2.

⁶¹⁶ Though not mentioned in the Articles of Agreement, the World Bank has the 'implied power' to establish and administer trust funds. See Operational Policy 14.40 (July 2008), which states, however, that as trust fund administrator, the Bank must still act in line with its mandated purposes and depending on the type of trust funds, other applicable policies and procedures (para. 3 lit. a).

⁶¹⁷ For instance, trust funds can disburse not only to governments, but also to international organizations or non-governmental organizations, and can finance activities that are executed by the World Bank itself. Moreover, trust funds usually come with their own governance structure, lending criteria, processing procedures and implementation modalities.

⁶¹⁸ For a trust fund, the World Bank usually enters into a legal agreement with one or more donors, the administration agreement, in which it accepts to administer the resources they provide. In addition, however receives disbursements from the trust fund to carry out specific activities needs to sign a grant agreement with the World Bank as the trust fund administrator. On different types of donor agreements, see BANTEKAS, *Trust Funds under International Law. Trustee Obligations of the United Nations and International Development Banks*, 99-110.

⁶¹⁹ On the Bank's fiduciary duty, see section 1 b) of this chapter.

⁶²⁰ Bosnia is a successor state of the Socialist Federal Republic of Yugoslavia (SFRY). The SFRY seized to be a member of the Bank in 1993, but Bosnia had not yet succeeded in its membership in 1994. On the role of the USA in convincing the Bank to become involved in Bosnia, see SEBASTIAN MALLABY, *The World's Banker. A Story of Failed States, Financial Crises, and the Wealth and Poverty of Nations* (Penguin Press, 2004), chapter 5 (Mission Sarajevo), pp. 116-144.

⁶²¹ THE WORLD BANK, *'Post-Conflict Reconstruction. The Role of the World Bank'*, 4. In 1997, nearly a quarter of the IDA's commitments (excluding China and India) were already going to countries emerging from conflict, e.g. Rwanda, Sierra Leone, and Balkan states (p. 1).

By the time the World Bank was asked to engage in Kosovo and East Timor in 1999, the legal department did not bother to provide a comprehensive, legal justification for assistance to non-members, which had already become an established practice.⁶²²

Yet Kosovo and East Timor challenged the ingenuity of the Bank's jurists in more regards. Both had recently emerged from conflicts that eventually involved the secession from a member state of the Bank. With state institutions not yet existent or having suffered total collapse, Kosovo and East Timor were placed under the authority of a UN administration for an interim period.⁶²³ During that time, both had no fully functioning, elected government. Instead, the respective UN administrations exercised far-reaching, sovereign powers, acting as trustee on behalf of the administered populations.⁶²⁴ Under these circumstances, it was not only an issue whether the Bank could provide financing given their non-member status. It was not clear who could request the Bank's assistance, serve as legal counterpart, receive disbursements, and assume responsibility for implementation.

In Kosovo, the World Bank became engaged following the adoption of Security Council Resolution 1244, which called for a coordinated international effort to support Kosovo's reconstruction.⁶²⁵ Financial resources initially came from the Bank's Post-Conflict Trust Fund and a newly created Trust Fund for Kosovo.⁶²⁶ In the absence of a fully effective, national government, the World Bank decided to

⁶²² World Bank Assistance to Kosovo – A Legal Analysis. Legal Memorandum by the Acting Vice President and General Counsel, Annex I of the Transitional Support Strategy for Kosovo, R99-1 (September 16, 1999), at 3, referring to the developed “approaches and mechanisms allowing the Bank, in exceptional cases, to assist non-members”.

⁶²³ Kosovo was placed under a UN administration that should enable its people to enjoy substantial autonomy and self-government within the Federal Republic of Yugoslavia, pending the final settlement of its legal status. See Security Council Resolution 1244, UN Doc. S/RES/1244 (June 10, 1999). East Timor had voted for independence in 1999, but was put under UN administration for an interim period before independence was to become effective in 2002. See Security Council Resolution 1272, UN Doc. S/RES/1272 (October 25, 1999).

⁶²⁴ On their respective competences, see, for instance, CARSTEN STAHN, 'The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis', 5 *Max Planck Yearbook of United Nations Law*, 105 (2001).

⁶²⁵ UN SC Res. 1244 (*supra* note 623) was adopted under Chapter VII. The Security Council therein “encourages all [...] international organizations to contribute to economic and social reconstruction” (para. 13). See also the World Bank's Transitional Support Strategy for Kosovo, Progress Report 2000, para. 1.

⁶²⁶ Given that no resolution of Kosovo's legal status was in sight any time soon, the IDA was later authorized by its member states to also provide grants from IDA's regular resources to UNMIK. Unlike the IBRD, the IDA has the mandate to provide financing to an international or regional organization, and therefore treated UNMIK as part of an international organization, the UN. The authorization to extend grants to UNMIK was given at the 13th Replenishment of IDA's Resources. See Additions to IDA Resources: Thirteenth Replenishment, IDNSecM2002-0488 (September 17, 2002), para 85. In June 2009, Kosovo became a member of the World Bank and the IMF, while at the time of writing, it had still not joined the UN.

conclude grant agreements on the basis of which the trust funds' resources could be disbursed with the United Nations Interim Administration of Kosovo (UNMIK). In East Timor, the Bank entered into grant agreements with the United Nations Interim Administration for East Timor (UNTAET).⁶²⁷ Given its far-reaching competences, the World Bank decided to treat UNTAET as a government for the purposes of extending assistance to East Timor.⁶²⁸ Notably, both UNMIK and UNTAET received only grants, not loans from the Bank, which would have implied the UN administration incurring long-term financial obligations on behalf of the administered territory and people.

In the course of the 1990s, the World Bank had demonstrated its readiness to overcome mandate restrictions to partake in the international community's joint efforts at post-conflict reconstruction. From the Bank's perspective, this involved finding an entity that could request and authorize its involvement, and perhaps more importantly, making sure that no financing was extended to an entity that could not legally guarantee its repayment. The Bank's evolving organizational practice was eventually consolidated with the adoption of OP 2.30 in January 2001.⁶²⁹

ii. Content and Consequences

OP/BP 2.30 on "Development Cooperation and Conflict" sets out the basic principles for engagement in countries affected by or in transition from conflict, and introduces specific instruments and considerations for planning or maintaining operations in these settings.⁶³⁰ Two provisions in OP 2.30 deserve special attention,

⁶²⁷ See, for instance, the Trust Fund for East Timor Grant Agreement concerning an Economic Institution Capacity Building Project, dated February 26, 2001. Agreements were concluded first with UNTAET, then with "East Timor as administered by [UNTAET]", and following its independence in 2002, with East Timor itself.

⁶²⁸ Chopra recalls that whereas "the UN tried to circumvent the issue by reducing the status of the grant agreement to a memorandum of understanding between the two institutions", "[t]he Bank refused and demanded that the agreement be accorded the stature of an international treaty between the IDA and a sovereign government." JARAT CHOPRA, 'The UN's Kingdom of East Timor', 42 *Survival*, 27 (2000), pp. 29-30. The Legal Memorandum on World Bank Assistance to East Timor (Sec M99-666, dated September 30, 1999) does not reveal the Bank's legal reasoning in this regard. However, when General Counsel Shihata decided in the case of Cambodia in 1993 to enter into a loan agreement with its official but unelected interim authority, the Supreme National Council, rather than the United Nations Transitional Authority in Cambodia (UNTAC), he did so on the basis of an assessment of their respective competences and decision-making structures. See SHIHATA, *The World Bank Legal Papers*, 213. UNTAC had, however, far less competences than UNTAET and UNMIK.

⁶²⁹ OP 2.30 on Development Cooperation and Conflict was first adopted in January 2001 and has so far been subject to only minor revisions in 2005, 2009, and 2013.

⁶³⁰ On the role of OP 2.30 in outlining the scope of the Bank's mandate concerning operations in conflict-affected states, see *supra* section 1 b) of this chapter; and MAURIZIO RAGAZZI, 'The Role of the

since they modify the legal grounds and permissible scope of Bank engagement on the basis of organizational practices developed over the 1990s.

The first provision concerns situations where there is no government in power. OP 2.30 expressly reaffirms that the Bank only operates in the territory of a member upon request of the government. The principal tenor is clear: the World Bank “is not a world government”.⁶³¹ Yet the Policy introduces a noteworthy exception to this fundamental principle of Bank involvement. If there is no government in power, “Bank assistance may be initiated by requests from the international community, as properly represented (e.g., by UN agencies), and subject in each case to the prior approval of the Executive Directors.”⁶³² Assistance can only be provided in the form of non-refundable grants or non-financial assistance, so that the Bank does not have to consider a country’s creditworthiness.

Second, OP 2.30 codifies the Bank’s practice of engaging in non-member countries, or in territories with an unresolved status. The Policy establishes that the organization’s “resources and facilities may be used for the benefit of a country that is not a member”, if such an engagement was found to be “beneficial to the Bank and its members”.⁶³³ Again, each such engagement requires approval from the Executive Directors.

OP 2.30 does not establish objective criteria for determining at what point a country has no government in power, what constitutes a “request”, who is authorized to represent the “international community” (apart from UN agencies), or when Bank engagement would benefit the membership as a whole. Moreover, neither OP 2.30 nor the corresponding BP 2.30 establish procedural requirements, for instance, regarding the decision-making process or form of approval required from the Executive Directors. The two provisions in the Policy have thus a primarily enabling nature. They grant full decision-making authority and discretion to the Executive Directors.

The fact that the Executive Directors have to approve any operation in the absence of a government in power or in non-member countries is important also for understanding the consequences of the Policy’s application. OP 2.30 itself does not

World Bank in Conflict-Afflicted Areas', 95 *American Society of International Law Proceedings*, 240 (2001).

⁶³¹ OP 2.30, para. 3 lit. a).

⁶³² OP 2.30, para. 3 lit. b).

⁶³³ OP 2.30, para. 3 lit. c). It is notable that the wording again refers to non-member countries, not territories. Strictly speaking, the provision would thus not apply to the West Bank and Gaza unless they were understood to belong to the territory of another (member or non-member) country.

modify the Bank's legal framework, i.e. provide a legal basis for such operations. It articulates and codifies a specific approach for staff to follow, and thus creates certain normative expectations as to the Bank's response. Only an approval from the Executive Directors, however, would make such operations conform to the Articles of Agreement. Since they have the power to interpret the Articles, their approval amounts to an implied interpretation.⁶³⁴ In the case of Bank operations in non-member states, we have seen that the relevant purposive interpretation of the Articles was provided by the General Counsel.⁶³⁵ In contrast, neither the General Counsel, nor the Bank's Management or Executive Board have apparently submitted an interpretation that reveals how they justify Bank operations at the request of the international community if there is no government in power. We will return to an evaluation of OP 2.30, but not before looking at the second Policy that is relevant in this context – OP 7.30 on Dealings with *De Facto* Governments.

b) Operational Policy on Dealing with De Facto Governments – Non-political Consideration of Political Circumstances

i. Background and Rationale

A rather common phenomenon the World Bank has to deal with are situations where a government comes to power by unconstitutional means, and possibly more than one entity purports to be the government in power.⁶³⁶ This may be the case after a coup d'état, where the Bank has to weigh the competing claims of the ousted and the coup government to represent the member country. Military coups alone, though not necessarily characteristic of fragile states, occur on average three times every year.⁶³⁷ In addition, doubts as to the *de facto* or *de jure* government of a country can arise in post-conflict situations, where transitions of power are often not orderly. For

⁶³⁴ IDA Articles Art. X lit. a). In practice, the World Bank's Legal Department has rendered an interpretation of the Articles to justify engagement, and these interpretations were then authorized through a Resolution of the Executive Board. On the Bank's practice of implied interpretations, see *supra* section 1 a) of this chapter.

⁶³⁵ See, for instance, the Legal Memorandum on World Bank Assistance to the West Bank and the Gaza Strip, R-93-163 IDA/R93-134, dated September 20, 1993. Perhaps more critical is an ensuing question that is not mentioned in the Bank's legal reasoning. To what extent would the Articles apply to operations outside the territories of member states, when many provisions, e.g. the political prohibition clause, refer only to member states?

⁶³⁶ On the high practical relevancy of unconstitutional changes of government for development organizations, see IFAD, Guidelines on Dealing with De Facto Governments, Draft document EB 2009/98/R. 16 for approval by the Executive Board, Rome, 15-17 December 2009, at paras. 1-8.

⁶³⁷ The occurrence of coups in many developing countries has, however, been associated with low income and low growth more generally. See PAUL COLLIER & ANKE HOEFFLER, *Coup Traps: Why does Africa have so many Coups D'état?* (Oxford University Press, 2005).

instance, conflict may result in an unconstitutional change of power to an interim or transitional authority that is not yet confirmed through a general election, as was the case in post-conflict Iraq. The link between conflict and unconstitutional changes of government is confirmed through mutual reference in OP 2.30 and OP 7.30.⁶³⁸

Though there is no established meaning of “*de facto* government” under international law, the term is often used to refer to a government that comes into power by means not provided for in the country’s constitution.⁶³⁹ It is not recognized by the majority of the international community, but exercises control over substantial parts of the territory. Since the choice of government is a matter of domestic law exclusively, only the effectiveness of a government, not its international recognition, affect the legal status of the state.⁶⁴⁰ Where a change of government is not in conformity with domestic law, however, international organizations still face difficulties in determining what entity to deal with, and what entity has the right to represent the member country in the organs of the organization.

International development organizations face an additional challenge: they need to decide whether to continue financing or extend new financing to an entity in a situation of legal uncertainty.⁶⁴¹ Particularly the World Bank, an international financial institution that provides loans, has an interest and indeed obligation to ensure their repayment. Hence, the Bank must assure itself that the loan-receiving government is actually able to enter into legal obligations for the country.⁶⁴² How it decides has potentially far-reaching material as well as political consequences for the

⁶³⁸ OP 2.30, para. 3 lit. b) and OP 7.30, note 4 (“The issues addressed in this OP may arise in the context of a country emerging from conflict”).

⁶³⁹ Other definitions are listed in STEFAN TALMON, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Clarendon Press, 1998), 60. For instance, it is not entirely clear whether “*de facto*” government refers to an entity in effective control that is not recognized, or whether doubts may also extend to the effectiveness or permanence of a government. In contrast to a *de facto* regime, however, the legal status of the state itself is not affected by the *de facto* nature of the government.

⁶⁴⁰ The Tinoco Arbitration case from 1924 confirms that the doctrine of effective control alone, not the recognition of a government on other grounds, e.g. illegitimacy or illegality of origin, are constitutive for the establishment of power. *Anguilar-Armory and Royal Bank of Canada Claims (Great Britain v Costa Rica)* (1923) 1 RIAA 369. *Arbitration between Great Britain and Costa Rica* (1924) 18 AJIL 147.

⁶⁴¹ Unconstitutional changes of government often go along with a suspension or abrogation of the constitution, and consequently entail not just a period of political instability, but also of legal uncertainty.

⁶⁴² E.g. IBRD Articles, Art. III Sect. 4 lit. v) (“the Bank shall pay due regard to the prospects that the borrower, and, if the borrower is not a member, that the guarantor, will be in position to meet its obligations under the loan”), and IDA Articles, Art. V, Sect. 1 lit. g).

entity concerned, not least because the decision has a signaling effect concerning the legitimacy of a *de facto* government at home and abroad.⁶⁴³

The World Bank was therefore the first international organization to formally establish criteria for determining under what conditions to engage with a *de facto* government for the purposes of development cooperation.⁶⁴⁴ In an attempt to codify the organization's best practice developed in response to a large number of cases, the Bank adopted OP/BP 7.30 in 2001.⁶⁴⁵

ii. *Content and Consequences*

OP 7.30 defines "*de facto* government" as one that "comes into, or remains in, power by means not provided for in the country's constitution, such as a coup d'état, revolution, usurpation, abrogation or suspension of the constitution".⁶⁴⁶ In such cases, the Policy highlights that the decision of the Bank to continue or discontinue operations does not amount to an "approval", i.e. recognition, of the government.⁶⁴⁷ Recognition is essentially a political act, and as such outside of the Bank's mandate. OP 7.30 does not concern who is entitled to represent a country at the Bank either,

⁶⁴³ The decision to engage with a *de facto* government becomes especially relevant where the legal status of a state or territory are in doubt, or a government's claim to power has not been universally recognized. See also MACRAE, et al., '*Aid to 'Poorly Performing' Countries: A Critical Review of Debates and Issues*', at 44 and note 30, who identify "a link between aid, the capacity of political authorities to govern and claims to juridical status."

⁶⁴⁴ The UN General Assembly has discussed the question of how to deal with situations where there is more than one government claiming power in its early days, but never agreed on specific criteria to be followed. See the UN General Assembly Resolution 396 (V) on Recognition by the United Nations of the Representation of a Member State (December 14, 1950), para. 1, stating that "the question should be considered in light of the Purposes and Principles of the Charter and the circumstances of each case", rather than in light of a specific set of criteria such as "effective control". In contrast then United Nations Secretary-General Trygve Lie had previously suggested certain principles to guide the United Nations decision in such situations, namely the assertion "whether the new government exercises effective authority within the territory of the State and is habitually obeyed by the bulk of the population." See his Memorandum on the Legal Aspects of the Problem of Representation in the United Nations, 1950, UN Doc. S/1466 (March 9, 1950).

⁶⁴⁵ Prior to the adoption of OP 7.30, a first policy-framework for dealing with *de facto* governments was outlined in the Bank's Operational Manual in 1964, and subsequently updated in 1978, 1991, and 1994. This illustrates that the Bank's original concern with *de facto* government situations did not have to do with its growing engagement with conflict-affected and fragile states. On the emergence of OP 7.30, see also CISSÉ, '*Should the Political Prohibition in Charters of International Financial Institutions be Revisited? The Case of the World Bank*', at 64.

⁶⁴⁶ OP 7.30, para. 1. The definition's focus on coup situations reflects that these were considered the most obvious examples, while other situations can also be considered under the policy. The application to interim or transitional authorities in the context of conflicts, for instance, gained in importance only after the policy was drafted in 1994.

⁶⁴⁷ OP 7.30, paras. 2 and 3. Despite this assurance, the Bank's decision to engage with a country can nonetheless be seen as an implicit endorsement of a government as legitimate and reliable counterpart. *Supra* note 643.

which is dealt with under the organization's credentials procedures. It solely regulates under what conditions the Bank can process new projects or administer existing ones, after an unconstitutional transition of power raises questions as to the ability and commitment of the *de facto* government to honor its obligations with the Bank.

For this purpose, OP 7.30 distinguishes between the handling of existing operations and of new operations. In the first case, the Bank has already concluded legal agreements with the ousted government, which it cannot unilaterally suspend or terminate other than under the conditions established in existing agreements. Accordingly, the Bank generally deals with the new, *de facto* government, provided that it is in effective control of the country; recognizes the country's past obligations and specifically its obligations towards the Bank; and is capable of implementing development projects and programs.⁶⁴⁸ The first criterion of effective control is particularly crucial in situations where more than one entity claims to be the government in power, as the Bank has to ascertain not only whether, but with whom to continue working.⁶⁴⁹

For new operations, the criteria are more demanding, reflecting the Bank's discretion in deciding on new operations. First of all, staff should allow "a certain time to pass". When carrying out assessments, they should consider not only whether the *de facto* government is in effective control, but also if it "enjoys a reasonable degree of stability and public acceptance".⁶⁵⁰ In order to assess the government's international acceptance, staff must consider how many countries, especially neighboring countries, have recognized the *de facto* government, and how other international organizations have responded to the situation.⁶⁵¹ In other words, the Bank does not want to be a trend-setter when deciding on whether to engage with a *de facto* government. Finally, staff are required to assess whether the government honors its financial obligations towards the Bank, or whether it is likely to challenge the previous government's competence or legitimacy to enter into such obligations – i.e. refusing its "odious debts".⁶⁵²

⁶⁴⁸ OP 7.30, para. 4 lit. a) – e), including further the requirement that the "government duly authorizes a representative for the purpose of requesting withdrawals".

⁶⁴⁹ In this context, if the ousted, *de jure* government of the country still exercises partial control or has some meaningful potential to regain power, the Bank must also be careful not to subvert its claim to power by engaging prematurely with a *de facto* government.

⁶⁵⁰ OP 7.30, para. 5 lit. b).

⁶⁵¹ OP 7.30, para. 5 lit. d) and e).

⁶⁵² OP 7.30 para. 5 lit. a) and note 6 concordantly, explicitly referring to the "general but not unqualified principle of international law" that obligations must be honored by successor governments.

Next to the decision-making criteria established in OP 7.30, BP 7.30 regulates in detail the decision-making process. It is a decentralized process that accords the ultimate decision-making authority to Bank staff, as they are most familiar with the situation on the ground. The Country Director first ensures that no further disbursements are made under existing loans, pending consultation with the *de facto* government. He is responsible for gathering all relevant information about the new government and situation in the country, and initiates an internal, consultative process, including with the legal department.⁶⁵³ The final decision rests with the Regional Vice President.⁶⁵⁴ Though Management is not required to inform or consult the Executive Board, in practice, it usually does. Both the Bank's assessments and its final decisions under OP 7.30, however, are considered as deliberate information and hence not disclosed to the public.

What follows from the World Bank's assessment of the *de facto* government's nature? As soon as a *de facto* government takes power in a country, and prior to a final decision on the Bank's response, the Country Director may put the large majority of payments on hold. Initially, the suspension of disbursements occurs as a temporary measure, for which staff should seek an "informal agreement with the new authorities in the country".⁶⁵⁵ In the event that the Bank's internal assessment yields that it cannot continue engaging with the *de facto* government, it tries to suspend or terminate its existing legal commitments. Suspension or termination, however, are legal remedies that can be applied only on the basis of well-argued grounds, which are valid under the applicable financing agreement, the General Conditions, as well as provisions on suspension in applicable OPs/BPs.⁶⁵⁶ Suspension or termination are

For instance, it has occurred that governments refuse to meet the obligations incurred by a previous, *de facto* government, on the grounds that it did not have the competence or legitimacy to enter into long-term obligations for the country. In the famous Tinoco Arbitration Case (*supra* note 640), Costa Rica failed to fend off obligations under a contract concluded by the previous coup government (the Tinoco regime) with a British company. For a summary of the debate concerning the odious debts doctrine, which holds that debt incurred by a regime for purposes that do not serve the interests of the nation should not be enforceable, see LEE C. BUCHHEIT & G. MITU GALATI, 'Odious Debts and Nation-Building: When the Incubus Departs', 60 *Maine Law Review*, 478 (2008), pp. 480-485; and the overall affirmative contributions in ASHFAQ KHALFAN, et al., Centre for International Sustainable Development Law (CISDL) Working Paper, 'Advancing the Odious Debt Doctrine' (2003).

⁶⁵³ BP 7.30, paras. 1-3.

⁶⁵⁴ BP 7.30, para. 6. The Vice President needs to take into account the recommendation made by the Country Director, which again needs to be cleared by the legal department.

⁶⁵⁵ BP 7.30 para. 4. The legal basis for this temporary measure is not specified in BP 7.30, but in practice, the Bank can claim, for instance, that the new government's representatives must first obtain a new authorization to make withdrawals.

⁶⁵⁶ Namely, OP/BP 8.60, Development Policy Lending, OP/BP 9.00, Program-for-Results Financing, and OP/ BP 10.00, Investment Project Financing. See also IDA's General Conditions on credits and

thus no automatic consequences of an OP 7.30 assessment. After all, OP 7.30 remains an internal rule that yields to the financing agreement as an international legal treaty, as well as the General Conditions that are incorporated by reference in all financing agreements.

Still, Operational Policy 7.30 has the legal effect of authoritatively guiding Bank staff in their immediate response to unconstitutional changes of government. At least concerning the decision to take up new operations in such contexts, OP 7.30 essentially expands the criteria and modifies the process whereby projects and programs are usually processed, according a greater role to factors pertaining to a government's effectiveness and legitimacy. Moreover, the application of OP 7.30 turns the burden of proof to the *de facto* government, which has to demonstrate it meets the criteria for continued disbursement or new lending.

c) Comparison and Evaluation

Operational Policy 2.30 and 7.30 are of central importance to the Bank's engagement in fragile states. Together, they determine how the organization engages in non-member countries or in countries with no effective government, and how it identifies an effective government counterpart in the first place. The two Policies reflect the Bank's approach where questions concerning the juridical aspects of statehood in the broadest sense have posed legal obstacles to its involvement in fragile states. How, and to what effect has the World Bank adapted its legal and policy framework?

Beginning with the first part of the question, the World Bank has not only sought to deal with the legal obstacles it encountered in conflict-affected and fragile states *ad hoc*, on a case-by-case basis, for example by making use of policy waivers.⁶⁵⁷ Instead,

Art. VI, in particular Sect. 6.02 lit. e), since an unconstitutional change of government could constitute an "extraordinary situation", "which makes it improbable that the Project can be carried out or that the Recipient or the Project Implementing Entity will be able to perform its obligations under the Legal Agreement to which it is a party."

⁶⁵⁷ Other international development organizations have in fact prepared the use of waivers when faced with similar questions like the World Bank. For example, the IFAD has extended loans and grants (i.e. not only trust fund resources) to the West Bank and Gaza, though it was equally restricted from using its resources in non-member territories. Therefore, IFAD's Governing Council, the equivalent to the World Bank's Board of Governors, waived the application of the concerned Article 7, Section 1 (b), of the Agreement Establishing IFAD, by passing a decision with the same majority that is required for a formal amendment. With a discussion in detail, see RUTSEL MARTHA, 'Mandate Issues in the Activities of the International Fund for Agricultural Development (IFAD)', 6 *International Organizations Law Review*, 447 (2009), pp. 465-472.

the organization has codified organizational practices and mandate interpretations in internal rules, which authoritatively guide its decision-making thereafter.⁶⁵⁸ Whether it is in spite of, or rather because of, the often complex and deeply political nature of the challenges at hand, it is remarkable that the World Bank has chosen to formalize its response. After all, how to deal with the absence of government or determine the effectiveness or legitimacy of *de facto* authorities are controversial questions even under general international law.

The Bank's decision to adopt OPs/BPs points to a demand for practicable guidance, and comes with the promise of enhancing the predictability, consistency, and transparency of decision-making on such matters. Whether this inherent promise of internal rule-making is met, however, depends on a number of factors pertaining to the Policies' design. To whom do they accord decision-making authority? To what extent do they determine decision-making criteria and process, and incorporate checks and balances – for instance, enabling public scrutiny through public disclosure?

In these regards, OP 2.30 and OP 7.30 show important differences, which partly reflect the different objectives for which they were adopted. The relevant provisions in OP 2.30 were introduced to justify Bank involvement despite mandate restrictions in certain post-conflict situations. Wanting to act quickly and in concurrence with the international community in such exceptional situations, the Bank required a simple authorization mechanism. Therefore, OP 2.30 grants the sole decision-making authority to the Executive Board. The Executive Directors approve an operation and imply it conforms to the Bank's mandate, without rendering a formal interpretation of the Articles of Agreement.⁶⁵⁹ The absence of any objective decision-making criteria or procedural demands in OP/BP 2.30, e.g. to hold internal consultations prior to taking a decision, confirms the impression that Bank involvement is left entirely to the purview of the political organ. The Executive Directors can use the granted discretion to respond swiftly to the circumstances of each case – or they can misuse it for politicized decision-making and selectivity, authorizing Bank involvement if it fits their interests. The fact that the deliberations

⁶⁵⁸ Notably, the consequences of a decision taken under OP 2.30 or OP 7.30 emanate from a different legal basis – an Executive Board approval that serves as an implied interpretation in the first case, or contractual remedies in second case. Still, it is these Policies that predetermine how the Bank addresses a certain situation, establishing decision-making criteria and process.

⁶⁵⁹ See *supra* note 634, and on the practice of implied interpretations, *supra* section 1 a) of this chapter.

are kept secret does not help to render the (informal interpretation) process more transparent.

Against this background, it is also difficult to assess the application of the Policy in practice. The Bank has engaged quite frequently outside the territories of member-states, for instance in newly-independent South Sudan prior to becoming a member.⁶⁶⁰ In contrast, there seems to be only one case where it relied on OP 2.30 to engage in a country with no government in power: Somalia. It is beyond doubt that Somalia was without an effective government for several years following 1991, and that it had and still has enormous development needs.⁶⁶¹ In this context, the Bank's ingenuity seems laudable. In accordance with OP 2.30, requests from the international community and approval of the Executive Directors allowed the organization to provide trust fund resources to support at least a limited number of operations in Somalia, in close collaboration with the UN.⁶⁶² It is not clear, however, why the decision-making process and underlying legal reasoning had to remain secret. After all, there may be more controversial cases concerning the application of OP 2.30 in the future – while the consequences of the Bank's decision to engage in a country with no government (consent) are significant. At second glance, even the case of Somalia is not uncontroversial. The AfDB, for example, chose to deal with Somalia's Transitional Federal Government (TFG) formed in 2004, whereas the World Bank only acknowledged the Federal Government of Somalia, established in 2012.⁶⁶³ The TFG

⁶⁶⁰ EVARIST BAIMU, *South Sudan: A New State is Born*, The World Bank - Law, Justice and Development (September 2011), at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:22994807~pagePK:210058~piPK:210062~theSitePK:445634~isCURL:Y~isCURL:Y,00.html> (accessed December 2014).

⁶⁶¹ Many international legal scholars have analyzed the case of Somalia and confirmed the breakdown of effective government as a defining element of juridical statehood. E.g. ALEXANDROS YANNIS, 'State Collapse and Prospects for Political Reconstruction and Democratic Governance in Somalia', 5 *African Yearbook of International Law*, 23 (1997); or KOSKENMÄKI, 'Legal Implications Resulting from State Failure in Light of the Case of Somalia'. On Somalia's development needs, see *supra* note 606.

⁶⁶² THE WORLD BANK, *Interim Strategy Note for Somalia for the period of FY 08-09* (June 21, 2007), para. 18: "Now and in the foreseeable future the Bank's engagement in Somalia is based on an explicit request from the international community." Requests were sought from the Special Representative of the UN Secretary General for Somalia, or the UN's Resident and Humanitarian Coordinator. They took the form of letters that described the humanitarian need in Somalia, and echoing the language of OP 2.30, called on the Bank's Management and Executive Board to approve a particular project. Approved projects were mostly small-scale, concentrated on Somalia's more stable regions Somaliland and Puntland, and were financed through trust funds like the SPF. At no point did the organization enter into legal relations with Somalia's transitional authorities, nor were any funds disbursed to or channeled through the government. Instead, funding was provided mostly to the UN, and in some cases for activities implemented by the Bank itself.

⁶⁶³ See AFRICAN DEVELOPMENT BANK, *Somalia Country Brief 2013-2015* (March 2013), Annex 10 on the AfDB's activities in Somalia since 2010.

was largely unable to exercise effective control over the territory during 2004 and 2012, but the Federal Government of Somalia still struggles to exert effective control.⁶⁶⁴

OP 7.30 was adopted with a rather different objective in mind than OP 2.30. The Policy aims to provide guidance to staff on how to deal with *de facto* governments without interfering in the political affairs of members – or for that matter, without having members interfere in the apolitical affairs of the Bank. In order to insulate the Bank’s loan decisions from the political preferences of its shareholders, OP 7.30 does not foresee a role for the Executive Board or Board of Governors – in contrast, for instance, to the practice of the IMF.⁶⁶⁵ At the World Bank, decisions are taken by the country and regional management, based on a list of decision-making criteria that are supposedly relevant to the economic viability of its operations, and following a comprehensive process of internal consultations.

Looking a bit closer, however, many of the criteria offer little practical guidance, and appear vague beyond a degree that is necessary to leave room to respond to individual cases. Particularly the “effective control” test is difficult to apply for the Bank’s staff, and so is determining the “stability and public acceptance” of a *de facto* government.⁶⁶⁶ For instance, what degree of public acceptance would be sufficient for the Bank to resume its engagement with an unelected, post-conflict government? And is there a hierarchy of importance between the different criteria, whereby the acceptance of a government can compensate for its limited effectiveness? It is also striking that while BP 7.30 regulates the assessment process and internal consultations in relative detail, the Country Director is free to decide when to invoke the Policy in the first place – i.e. whether or not an event constitutes an unconstitutional change of

⁶⁶⁴ The Bank’s decision to acknowledge the Federal Government of Somalia as the *de jure* government of the country and effective counterpart for the Bank is based on a confidential assessment of the Legal Department conducted in 2013. The decision is apparently based not so much on the government’s effectiveness at present, but rather on certain promising developments like the adoption of a constitution at last, which were seen as important steps towards asserting effective control, and had led to the wide endorsement of Somalia’s government within the international community.

⁶⁶⁵ The IMF leaves the decision of how to deal with a *de facto* government entirely to its member states. It conducts an informal poll among the Executive Directors, whose views are seen to reflect the majority view (in terms of voting power) of all members, and who determine.

⁶⁶⁶ GEORGIA HARLEY, 'To Disburse or Not to Disburse? Strengthening the World Bank’s Response to Revolutions and Coups d’Etat', 3 *Sanford Journal of Public Policy*, 20 (2012), 24, adding that it does not help that the term “effective control” has different meanings even under international law.

government.⁶⁶⁷ Moreover, decision-making under OP 7.30 is not subject to any form of independent monitoring or disclosure.⁶⁶⁸

Against this background, it is doubtful whether the Policy's objective – to decide an essentially political question through technical assessments that are free from member states' political meddling – can be attained. There are only very few studies that provide insights on the application of OP 7.30 in practice.⁶⁶⁹ Those studies suggest, however, that the World Bank indeed applies the Policy in a manner that is inconsistent beyond a measure that can be explained on the grounds that every case is unique.⁶⁷⁰ Rather, it seems that the position of regional (political) organizations and major bilateral donors, if not the geo-political and strategic relevance of a country in the eyes of the Executive Directors, have often influenced how the Bank deals with a *de facto* government.⁶⁷¹

To address the second part of the question – to what effect has the World Bank adapted its legal and policy framework – I look to three fundamental provisions of the Articles of Agreement as reference points. First, the organization is mandated to assist its member countries in achieving development objectives. OP 2.30 confirms that conflict has an adverse effect on the Bank's development mandate, and accordingly, that activities aimed at conflict prevention or mitigation fall within the Bank's

⁶⁶⁷ Moreover, once triggered, the Country Director can decide at what point he wants to apply the criteria and conduct an assessment, and only after the assessment has been made does the Bank decide whether or not to suspend a loan "in a matter of days" (BP 7.30, para. 4). In practice, most countries have remained under OP 7.30 with loan disbursements withheld only for shorter periods of about three months. In principle, however, the decision whether to resume normal operations with a *de facto* government could be postponed endlessly, leaving a state of limbo that concerns the Bank's operations and the *de facto* government.

⁶⁶⁸ The World Bank's Inspection Panel, for instance, reviews staff compliance with OPs/BPs during the planning and implementation stages only if a party directly affected by the Bank's operational activities in a country files a complaint. The (*de facto*) governments of member states cannot call for an investigation. See *supra* note 522.

⁶⁶⁹ For an analysis of the application of OP 7.30 in Afghanistan and Iraq, see MICHAEL NESBITT, 'The World Bank and De Facto Governments. A Call for Transparency in the Bank's Operational Policy', 32 *Queen's Law Journal*, 641 (2007); and for an analysis of Bank practice in Honduras 2009, Cote d'Ivoire 2010, Tunisia 2011, and Mali 2012, HARLEY, 'To Disburse or Not to Disburse? Strengthening the World Bank's Response to Revolutions and Coups d'Etat'.

⁶⁷⁰ E.g. NESBITT, 'The World Bank and De Facto Governments. A Call for Transparency in the Bank's Operational Policy', 643, arguing it "has not been applied with any degree of clarity or transparency".

⁶⁷¹ Harley thus explains why the World Bank rapidly continued its disbursements to Tunisia and Egypt following the Arab Spring revolutions, but was equally quick to suspend disbursements following coups in seemingly less important countries like Mauritania, Mali, and Niger. HARLEY, 'To Disburse or Not to Disburse? Strengthening the World Bank's Response to Revolutions and Coups d'Etat', 28. Also NESBITT, 'The World Bank and De Facto Governments. A Call for Transparency in the Bank's Operational Policy', who concludes from his analysis of the Bank's practice with regards to Afghanistan and Iraq that "the Bank has hurried to the aid of Western-oriented post-conflict societies" (at 671).

mandate.⁶⁷² Next to expanding the thematic scope of lawful Bank involvement, the Policy also expands its geographic scope, as it provides a basis for the organization to engage outside the territories of member states. OP 2.30 thus appears to reflect that the World Bank is increasingly prepared to overcome restrictions of its state-centric mandate that stand in the way of assisting fragile states and their populations in achieving development objectives. The Policy allows the objective of development to override other concerns, in that it emphasizes the need to stay engaged in the most difficult circumstances – political, or legal. Notably, the same cannot be said for OP 7.30. Applied legalistically, the Policy does not support (continuous) Bank involvement in a country with a post-conflict government that is not considered effective or legitimate.

In terms of standards of effectiveness, both Operational Policies cater to the World Bank's duty under the Articles of Agreement to ensure the effective use of resources and repayment of loans. This is most evident from the criteria in OP 7.30, which seek to ensure that Bank's decisions on how to deal with a *de facto* government take into account its interest as a creditor in the legal liability of its counterparts.⁶⁷³ In turn, the principle tenor of OP 2.30 appears to be in favor of enabling (continuous) Bank involvement in conflict-affected countries, where it is often difficult to guarantee the effective use of resources. Still, in both cases of extraordinary engagement under OP 2.30, we have seen that the organization usually engages not with its normal lending instruments, but as an administrator of trust funds.⁶⁷⁴ Particularly where the Bank's own resources are not involved and the organization provides grants, not loans, it has more flexibility concerning how, and to whom it can provide assistance.⁶⁷⁵ Accordingly, trust funds are perhaps the World Bank's principal tool to reconcile engagement in fragile and conflict-affected states with its fiduciary duties.⁶⁷⁶

⁶⁷² See already *supra* section 1 b) of this chapter.

⁶⁷³ Consider, for instance, the requirement for staff to assess the government's commitment to honor its obligations under international law, i.e. financial obligations towards the Bank. See *supra* note 652.

⁶⁷⁴ See section 3 a) of this chapter on the use of trust fund arrangements in the West Bank and Gaza, Bosnia, Kosovo, and East Timor, and Somalia.

⁶⁷⁵ E.g. *supra* notes 617 and 618. Importantly, following a trust fund reform initiative approved by the Board in October 2007, the Bank has sought to gradually align the processes and procedures used for trust funds it administers with the requirements applicable to normal Bank lending. For a comprehensive legal analysis of trust funds, see BANTEKAS, *Trust Funds under International Law. Trustee Obligations of the United Nations and International Development Banks*.

⁶⁷⁶ There are many more reasons why trust funds have become an increasingly popular financing instrument particularly in conflict-affected and fragile states, e.g. the associated benefits – at least

Finally, how do the two Policies relate to the protection of recipient sovereignty in the Articles of Agreement, the political prohibition clause? The political prohibition implies that the World Bank can only engage in a country upon the request of the government in power.⁶⁷⁷ To this fundamental principle of Bank involvement, OP 2.30 introduces an exception: engagement at the request of the international community in countries with no government. Though the Policy suggests that the exception needs to be authorized through an implied interpretation of the Executive Directors, it is not clear what provision of the Articles such an interpretation would rely on – or whether a formal amendment would be needed instead.⁶⁷⁸ Purposive interpretation is a common tool to adapt the statutes of international organizations to changing circumstances and demands, but is not without limits.⁶⁷⁹ An amendment of the Articles would have required a qualified majority in the Board of Governors, the organ where all member states are represented.⁶⁸⁰ This is certainly a higher barrier than an implied interpretation of the Executive Board, where only 25 member states are represented – but with its system of weighted voting, also not quite equal.⁶⁸¹

theoretically – of better donor coordination and risk sharing, funding predictability, transparency, and other principles of aid effectiveness. See, for instance, LEONIE GUDER, 'Multi-Donor Trust Funds: Instruments of First Choice for Post-Crisis Situations?' *Development Outreach*, 36 (February 2009); OLIVER WALTON, Governance and Social Development (GSD) Resource Center, 'Helpdesk Research Report: Trust Funds in Fragile and Low Capacity States' (2011); and with a more critical assessment of actual trust fund performance, INDEPENDENT EVALUATION GROUP, 'World Bank Assistance to Low-Income Fragile- and Conflict Affected States', pp. 115-120.

⁶⁷⁷ *Supra* note 559.

⁶⁷⁸ At least some provisions in the Articles of Agreement could have served as a basis for such a purposive interpretation. For instance, the IDA Articles generally accommodate the idea that there may be territories with no sovereign government, as the territorial application of the Articles extends to “all territories for whose international relations [each member] is responsible” (Articles, Art. XI, Sect. 3). Moreover, IDA may provide financing not only to a government, but also to “a public, or private entity in the territories of a member or members, or to a public international or regional organization” (Art. V Sect. 2 lit. c). And if the IDA cannot provide assistance to a country if the government objects, it is *prima facie* subject to interpretation what happens if there is no government to object.

⁶⁷⁹ See, for instance, MARTHA, 'Mandate Issues in the Activities of the International Fund for Agricultural Development (IFAD)', 474, arguing that one limit for the use of interpretation as a means for adapting the statutes of international organizations consists in the statutes' amendment procedures, which shall not be undermined by an excessive use of interpretation. Further limits can be found in the Articles' provision on interpretation itself. For instance, in the case that a question of interpretation arises that particularly affects a member that is not currently represented by an Executive Director, it has the right to attend their meeting. Any member state can require a controversial question of interpretation to be referred to the Board of Governors. IDA Articles Art. X lit. a), in accordance with Article VI, Sect. 4 lit. g) and lit. b). However, both provisions are of limited use to member states with no government in power or non-member states – which underscores how problematic the Bank's reliance on interpretation is in this context, and even more informal interpretation.

⁶⁸⁰ *Supra* note 535.

⁶⁸¹ Notably, an earlier formulation of the Bank's evolving practice in its 1998 Report on Post-Conflict Reconstruction required the Board of Governors to approve Bank operations in such cases, not the

OP 7.30 was introduced to guide Bank staff in responding to situations that require navigating exceedingly close to the political prohibition clause. Virtually all of the criteria that staff need to consider when deciding about new loans or administering existing ones involve the consideration of political circumstances. As noted before, the Bank can take political circumstances into consideration if it is sufficiently clear that they could affect the viability of a project or program in economic terms.⁶⁸² Whether this is always the case concerning the criteria of OP 7.30 is, however, doubtful. For instance, there is no sufficiently clear link between the number of states that have recognized the *de facto* government and the success of the Bank's operations. The World Bank argues that a non-recognized government would be internationally isolated and as a consequence, projects could no longer successfully be implemented. Yet this is not always the case, and international recognition should thus be a decision-making factor only if it is clearly relevant for the economy or efficiency of a project.⁶⁸³ Similarly, OP 7.30's criteria do not only require the Bank to ascertain the effectiveness of a *de facto* government, but also its "public acceptance".⁶⁸⁴ Perhaps the public acceptance of a government increases the likelihood that World Bank loans will be put to use in a way that benefits the population. Nonetheless, the link between the legitimacy of a government and its ability to serve as an effective partner for the Bank is not always obvious. The problem with OP 7.30, it seems, is that the Policy emphasizes the technical nature of the relevant assessments, but it cannot disguise the quintessentially political nature of the issue at hand.

If the political prohibition clause has thus been sidelined in both Policies, it is by a somewhat vague reference to the interests of the international community. The World Bank has often engaged in post-conflict countries when it was called to partake

Executive Board. See THE WORLD BANK, '*Post-Conflict Reconstruction. The Role of the World Bank*', 30, requiring "prior approval of the Board, where all Bank members are represented."

⁶⁸² See *supra* section 1 b) of this chapter.

⁶⁸³ The IFAD has drafted a similar policy for dealing with *de facto* governments than the World Bank, but has explicitly sought to modify its criteria "to emphasize the practical over the political", and therefore consider international recognition only where it directly impacts on the likelihood that IFAD's projects can be carried out successfully. IFAD, Guidelines on Dealing with De Facto Governments, EB 2009/98/R.16 (17 November 2009), para. 12. The final draft of IFAD's Guidelines approved in 2011, however, does not include such a specification, apparently because it was not in the interest of Executive Board members.

⁶⁸⁴ Notably, while many states consider a government's internal legitimacy when deciding to enter into diplomatic relations, traditionally, international legal doctrine knows only the "effective control" test to identify the government of a country E.g. MAGIERA, 'Governments', para. 18; and on 'effective government' as a criterion of statehood under international law, *supra* chapter I.3 a).

in the broader reconstruction and state-building efforts of the international community. The notion of community interests features prominently in both of the examined provisions in OP 2.30 – Bank engagement may be requested by the “international community”, or be approved if “beneficial” to the Bank’s membership as a whole. Such collective expressions of interest can substitute for a request from the government – that is, state consent. In a similar vein, Deputy General Counsel Hassane Cissé has noted that the Bank’s approach under OP 7.30, though it may seem to involve political considerations, would be “consistent with the Bank’s will to act as a good and responsible international citizen.”⁶⁸⁵

At the same time, the World Bank has demonstrated some flexibility in accepting entities other than the *de jure* government of a country as counterparts for some restricted purposes. In a country like Somalia, this sort of legal ingenuity seems vindicated, and may even be grounded in the emerging legal concept of responsibility to protect.⁶⁸⁶ Yet institutions that claim to represent the international community in post-conflict countries, for instance UNTAET in East Timor or UNMIK in Kosovo, can also suffer from doubtful democratic legitimacy. How far should the Bank go with long-term development plans for a country with no sovereign government? Ultimately, it appears vital that the World Bank will strive to ensure the maximum leadership and participation of the local population in such circumstances.

4. Empirical Statehood and the Regulation of Operations in Countries with Weak Capacity

The World Bank does not only require national governments as legal counterparts. The state-centric development paradigm further translates into the way the Bank plans and implements development projects and programs.⁶⁸⁷ Recipient governments are expected to draft long-term, national development strategies, to prepare concrete projects, and to ensure their implementation in accordance with the Bank’s economic and fiduciary, environmental and social standards. The roles and responsibilities of national governments and the Bank in the development process are outlined in the Articles of Agreement, and concretized in a comprehensive set of internal rules. The

⁶⁸⁵ Cissé, 'Should the Political Prohibition in Charters of International Financial Institutions be Revisited? The Case of the World Bank', 66.

⁶⁸⁶ On the responsibility to protect, see *supra* chapter I.3 b)

⁶⁸⁷ On the state-centric paradigm of development cooperation and its premises in terms of juridical and empirical statehood, see *supra* chapter II.2 a)

World Bank hence requires government counterparts that are literally effective – governments with basic levels of institutional and administrative capacity and political commitment.

In the weak-capacity, politically unstable environments of many fragile and conflict-affected states, however, these conditions are not always met. Governments may lack the capacity to meet the Bank's *ex ante* requirements, for instance, or fail to implement projects and programs as agreed, resulting in the suspension of aid.⁶⁸⁸ How does the Bank operate in countries with weak capacity or commitment to assume ownership? More specifically, where have rules that govern the process of development cooperation proven inadequate or ineffective when engaging with fragile states, and how did the organization adapt?

To effectively engage and achieve development objectives in fragile states, the World Bank has included special provisions in the rules that regulate how its staff normally plan and implement operations. Through these provisions, the organization has essentially postponed or reduced requirements for governments with weak capacities, while scaling up capacity-building and implementation assistance. Although the Bank has thus introduced a sort of differential treatment, its approach has not always been systematic, and not explicitly targeted at fragile states.

In this section, I look at the substantive and procedural rules that regulate the World Bank's normal lending operations, and examine how, and to what effect they have been adapted for fragile states. I distinguish between the organization's three financial instruments, which serve different purposes and are therefore subject to different requirements:⁶⁸⁹ Investment Project Financing (a), Development Policy Lending (b), and Program-for-Results Financing (c). To conclude, I summarize and compare the approach chosen under each of the three regimes, considering how each of them balances the World Bank's mandated objective of development, standards of effectiveness, and the protection of recipient sovereignty (d).

⁶⁸⁸ It must be noted, however, that while implementation rates have often been lower in fragile states than in other countries in the past, more recent trends suggest otherwise. See JOEL HELLMAN, *Surprising Results from Fragile States*, World Bank Blog (October 15, 2013), at <http://blogs.worldbank.org/futuredevelopment/surprising-results-fragile-states>.

⁶⁸⁹ Which of the three instruments the Bank uses in a country generally depends on the circumstances of a country, including donor relations with the government. The respective reasoning is laid out in the Country Partnership Framework (CPF), which is prepared by the Bank's staff in consultation with national authorities. The CPF is a medium-term strategy that establishes the basic parameters of Bank assistance to a country.

a) Investment Project Financing – A Kind of Differential Treatment

i. Background

The largest share of the IDA's concessional loans or grants is provided for concrete development projects and programs that pursue specified results. Project lending, called Investment Project Financing or IPF at the Bank, is the organization's original and still central financing instrument, which accounted for 75 to 80 percent of all lending over the past two decades.⁶⁹⁰

IPF operations are subject to a complex and dense regime of substantive and procedural requirements, which result from the Articles of Agreement, as well as more detailed stipulations in Bank-internal rules, particularly OP/BP 10.00 on Investment Project Financing.⁶⁹¹ OP/BP 10.00 forms the core of the Bank's project lending regime, regulating the process from project identification to approval. The regime is structured by the dual objective of assisting member states in achieving their own development objectives, while ensuring the purposeful and effective use of the Bank's resources.⁶⁹² Accordingly, recipient governments can formally request the Bank to become active, determine the design of the project, and render approval to the terms and conditions under which it is financed.⁶⁹³ Whether the World Bank agrees to finance and continues financing a project depends, however, on the ability of the government to meet a number of requirements.

To qualify for investment lending, governments have to propose a project that meets the Bank's standards in terms of, *inter alia*, economy and effectiveness, financial management and procurement, as well environmental protection, protection of indigenous people, and protection from involuntary resettlement.⁶⁹⁴ For each of the latter, safeguard policies prescribe thorough assessments to be conducted by every country applying for funding, including, for instance, the consultation of certain

⁶⁹⁰ THE WORLD BANK, 'Annual Report 2014', Table 19 (p. 58). On the historic evolution of the Bank's project lending regime, see SHIHATA, *The World Bank in a Changing World*, pp. 85-109.

⁶⁹¹ OP/BP 10.00 on Investment Project Financing, April 2013, replacing OP/BP 10.00 on Investment Lending: Identification to Board Presentation (June 1994), subsequent to a major reform of the Bank's investment lending operations. On the reforms, see *infra* note 707.

⁶⁹² See *supra* section 1 b) of this chapter on standards of effectiveness in the Bank's legal framework, and chapter III.2 on effectiveness as a basic idea in the law of international development organizations.

⁶⁹³ IDA-Articles Art. V Sect. 1 lit. d) and e) and in detail, OP/BP 10.00.

⁶⁹⁴ OP 10.00, paras. 3-9 and BP 10.00 regulate in detail the respective roles of the Bank and the borrower in the process from the initial project proposal and preparation, through its appraisal by the Bank according to Bank-determined standards (paras. 15-25), up to its approval.

vulnerable groups and the preparation of comprehensive risk-mitigation strategies.⁶⁹⁵ Further, the Bank imposes an entire regime of procurement guidelines on the recipient. The Bank's financial management arrangements at least rely on the country's existing institutions and systems guidelines where feasible. By signing the legal agreements after which an operation proceeds to implementation, recipients further commit to implement projects "with due diligence", and to maintain appropriate implementation, monitoring, and evaluation arrangements.⁶⁹⁶

For fragile states that lack the necessary institutional and administrative capacities, meeting the accumulated requirements to qualify for project lending from the World Bank is particularly difficult and cumbersome, and can put a further strain on their already scarce resources and capacities. Non-compliance during implementation, in turn, can result in the suspension or termination of operations, contributing to the high level of aid volatility that constitutes a major problem for fragile states.⁶⁹⁷ For the Bank, the demanding standards, procedures, and accountability mechanisms for IPF operations create stumbling for rapid engagement in countries with weak capacity, physical insecurity, and political instability.⁶⁹⁸ At the same time, the Bank introduced safeguard policies and enhanced its pre-approval assessments and supervision requirements precisely to respond to the criticism that the projects it financed were violating environmental and social standards, or were not effectively implemented.⁶⁹⁹

⁶⁹⁵ Safeguard policies are Bank-internal policies aimed at preventing and mitigating potential harm to people and the environment caused by Bank-financed projects. Safeguards are contained in separate OPs/BPs, most notably OP/BP 4.01 on Environmental Assessment; OP/BP 4.10 on Indigenous Peoples; and OP/BP 4.12 on Involuntary Resettlement. At the time of writing, the Bank's safeguard policies were undergoing major reforms, which are likely to result in the adoption of an integrated framework of safeguard policies. See THE WORLD BANK, *The World Bank's Safeguard Policies. Proposed Review and Update – Approach Paper* (October 2012), and with an analysis of the current system and a proposal for reform, DANN & VON BERNSTORFF, *Reforming the World Bank's Safeguards. A Comparative Legal Analysis*.

⁶⁹⁶ OP 10.00, para. 18. OP/BP 13.60 on Monitoring and Evaluation imposes further procedural obligations on the recipients of loans, who are asked to self-evaluate and report on the project's implementation. Additional sanctions mechanisms are provided for in separate OPs, depending on the violated standard.

⁶⁹⁷ In case of non-compliance, the Bank has an array of options to respond, from temporary suspension to cancellation of disbursements, and the demand for reimbursement of credits or grants. See in particular the IDA General Conditions, Art. VI on Cancellation; Suspension; Acceleration; Grant Refund.

⁶⁹⁸ See The World Bank, *Toward a New Framework for Rapid Bank Response to Crises and Emergencies* (*supra* note 552), stating that operational delays have been problematic in many countries with very weak capacities and fiscal difficulties.

⁶⁹⁹ The safeguard policies were introduced in response to the mounting criticism that Bank-financed project were causing environmental harm, contributing to displacements, or violating indigenous peoples' rights (see *supra* note 470). *Ex ante* assessments and ongoing supervision of Bank-financed projects were increased in response to the Wapenhans Report of 1992, which found that Bank staff

In countries where national environmental and social standards, for example, are low or unenforced, or where public resource management is fraught with corruption, the high standards of the investment project lending regime thus seem particularly warranted.

How has the organization addressed the dual challenge of rendering assistance to weak capacity and poorly governed countries, without compromising its development mandate and standards of effectiveness?

ii. Special Provisions for Investment Project Operations in Fragile States

In order to avoid delays or suspensions of aid in fragile states, the World Bank first began referring to its emergency policies and procedures, namely OP/BP 8.00 on Rapid Response to Crises and Emergencies.⁷⁰⁰ Though adopted with single-event emergencies in mind, with the Bank's increasing engagement in post-conflict situations in the mid 1990s, the Policy gradually became its preferred tool for avoiding the procedural and material requirements of normal lending operations.⁷⁰¹ On the basis of the broad definition of "crises or disasters" in OP 8.00, World Bank staff argued that conflict-affected or post-conflict countries suffered from severe social and economic distortions, which needed to be addressed with emergency operations.⁷⁰² Once triggered, the Policy permitted the Bank to engage more rapidly by reducing *ex ante* requirements for project approval or modifying fiduciary and safeguard requirements to facilitate implementation.⁷⁰³ Additionally, BP 8.00 established special procedural arrangements for the entire project cycle, with the declared objective of enhancing speed, flexibility and simplicity. In return, staff were

often approved loans without paying proper attention to their supervision implementation ('approval culture').

⁷⁰⁰ OP/BP 8.00 on Rapid Response to Crises and Emergencies (March 2007) is here referred to as "old OP 8.00", since it was considerably revised in April 2013, to reflect the fact that some of its provisions on exceptional treatment of emergency operations are now mainstreamed in the new OP 10.00.

⁷⁰¹ THE WORLD BANK, *Post-Conflict Reconstruction. The Role of the World Bank*, at 33.

Approximately two-thirds of countries recognized in the Bank's list of fragile situations in 2012 had emergency operations between 2005 and 2012, and these were seldom in response to natural disaster. For instance, in Haiti, the World Bank used OP 8.00 to work with the government and the UN Peacekeeping mission to improve road access and refuse collection in highly insecure urban slums of the capital. See The World Bank, *Toward a New Framework for Rapid Bank Response to Crises and Emergencies* (*supra* note 552), at 23, also noting that the Bank often engaged on the basis of a case-by-case, *de facto* expansion of the narrow definition of emergency in OP 8.00.

⁷⁰² Old OP 8.00, para. 2. Notably, the use of OP 8.00 for post-conflict operations is made explicit by means of reference in OP 2.30 on Development Cooperation and Conflict, footnote 1.

⁷⁰³ Old OP 8.00 para. 7.

required to exercise more intense supervision, thus shifting the balance between (reduced) *ex ante* requirements and (enhanced) *ex post* control.⁷⁰⁴

By continuously invoking OP 8.00, a Policy designed for emergencies, in fragile states, the World Bank essentially treated a possibly permanent condition of weak state capacity as exceptional. In other words, state fragility was addressed as an exceptional deviation from a normal condition that could be returned to once crisis had ceased – while the Bank’s evolving conceptual understanding of state fragility suggested the opposite.⁷⁰⁵ In practical terms, the reliance on OP 8.00 also meant that staff constantly had to justify the persistence of an “emergency” situation. And while the Policy allowed to temporarily shift requirements from *ex ante* to *ex post*, it did not allow to adjust them to the fact that “business as usual” may not be returned to in the medium-term.

In light of these constraints, the World Bank decided to formalize its organizational practice of using emergency policies and procedures in fragile states. In 2013, in the wake of a major reform of the investment lending regime, it substantially revised OP 10.00 and mainstreamed the option of downsizing requirements for all countries experiencing capacity constraints.⁷⁰⁶ The changes to OP 10.00 must be understood as part of a broader effort to consolidate a complex and incoherent set of policies and procedures for investment lending.⁷⁰⁷ For instance, the new Policy involves a general shift of the World Bank’s role, from supervising how recipient countries implement projects on the basis of prescribed standards, to providing implementation support.⁷⁰⁸ The introduction of more flexible requirements specifically for conflict-affected and fragile states, however, was also a central recommendation of the WDR 2011.⁷⁰⁹

⁷⁰⁴ Old OP 8.00 para. 1 lit d) and BP 8.00 para 7.

⁷⁰⁵ See, for instance, The World Bank, Operationalizing the WDR (*supra* note 359), Annex A, para. 4, explaining that fragility is “a long-term challenge rather than an episodic emergency”.

⁷⁰⁶ The purpose of OP 8.00 remains to outline the basic principles, objectives, and limits of Bank engagement in the context of crises and emergency, and the Policy was accordingly revised in April 2013.

⁷⁰⁷ On the purpose, the principle parameters, and concrete policy changes of the first major reforms to the Bank’s most important financial instrument since the 1960s, see the concept note on „Investment Lending Reform“ (January 26, 2009) and the Board paper “Investment Lending Reform: Modernizing and Consolidating Operational Policies and Procedures” (November 1, 2012).

⁷⁰⁸ BP 10.00, paras. 30-46.

⁷⁰⁹ For instance, the Report recommends that demanding procedures for project supervision and procurement be “distilled to the simplest level of due process”, and that fiduciary safeguards should be revised to avoid that disbursements be automatically suspended or terminated in case of delays or failures. THE WORLD BANK, 'World Development Report: Conflict, Security, and Development', at 277.

The revised Policy establishes that not only projects in countries that are deemed “in urgent need of assistance because of natural or man-made disaster or conflict”, but also those that “experience capacity constraints because of fragility or specific vulnerabilities (including small states)” are eligible for certain exceptions.⁷¹⁰ Fragility is determined on the basis of the Bank’s CPIA-based list of fragile situations, or in the case of sub-national fragility in an otherwise stable country, if it pertains to an area with “very low capacity, unstable and rapidly changing conditions and limited or no functional state presence.”⁷¹¹ As previously under OP 8.00, exceptions from the Bank’s normal project lending regime concern the deferral of fiduciary, environmental and social requirements to the implementation phase; the use of simplified and accelerated procedures; and the use of alternative implementation arrangements in countries with limited capacity.⁷¹² Alternative implementation arrangements imply that the Bank can, instead of working through national institutions, rely on other international agencies or implement projects itself, for instance through the use of trust fund.⁷¹³ Such arrangements must, however, be limited in time and supplemented with capacity-building measures.⁷¹⁴

How such exceptions are approved and applied is subject to Bank Procedures 10.00. Exceptional arrangements must be requested by the recipient’s government and approved by the Bank’s Management, if it determines that the country meets the Policy’s eligibility criteria.⁷¹⁵ In addition to BP 10.00, the World Bank has issued detailed, though non-binding instructions that provide further guidance on the use of exceptional arrangements.⁷¹⁶ Once approved, Bank staff can accordingly access a menu of options that are not available under the Bank’s normal investment lending regime, from deferring substantive requirements under the safeguard policies, to

⁷¹⁰ OP 10.00, para. 11.

⁷¹¹ Instructions: Preparation of Investment Project Financing – Situations of Urgent Need of Assistance or Capacity Constraints (2013), p. 6. Instructions are issued by the Bank to provide more detailed step-by-step guidance than contained in BPs, to help staff process a transaction. On the Bank’s classification of fragile states, see *supra* section 2 of this chapter.

⁷¹² All exceptions are established in OP 10.00, para. 11 lit. (a) - (e), and the procedural modifications particularly in BP 10.00, para. 47 lit. (c). With these exceptions now included in OP 10.00, the old OP 8.00 was accordingly revised and is now focused on establishing guiding principles and objectives, as well as the permissible forms and scope of Bank engagement in response to crises and emergencies.

⁷¹³ OP 10.00, para. 11 lit. (d) permits the Bank to “enter into agreements with relevant international agencies, including the United Nations, national agencies, private entities, or other third parties”, or use grants or trust funds arrangements to implement activities itself. On the flexibilities associated with the use of trust funds, see section 3 a) and c) of this chapter.

⁷¹⁴ OP 10.00, para. 11 lit. (e) and BP 10.00 para. 47 lit. (b).

⁷¹⁵ BP 10.00, para. 47.

⁷¹⁶ *Supra* note 711.

simplified procedures, and alternative implementation arrangements for start-up activities. Which of these measures they apply is subject to discretion, and the recipient state in whose territory the project is implemented gains no entitlement to a certain treatment.

Arguably, the World Bank has thus introduced a kind of differential treatment in the legal regime for investment project lending – it uses differentiated standards and differentiates at the implementation level, with the explicit aim of acknowledging and addressing material differences between its member states.⁷¹⁷

b) Development Policy Lending – Ownership as an Objective, not a Precondition

i. Background

Through Development Policy Lending, more commonly known as budget assistance, the World Bank provides financial assistance to the general budget of recipient countries, to support pro-development policy and institutional reforms. In contrast to project lending, budget assistance constitutes a source of untied funding for country-owned programs, which are managed and implemented through the country's national systems. Development Policy Operations (DPO) thus allow larger sums of money to be disbursed quicker, at minimal administrative burden for recipient states, in exchange for the promise of introducing policy change.

In some regards, Development Policy Lending thus appears particularly suitable for fragile states. By channeling aid through national systems, DPOs focus on strengthening the capacity of state institutions to carry out basic functions. Because donors align with government-owned programs when providing budget assistance, the burden on weak governments to meet the requirements of various donor-imposed parallel systems is reduced.⁷¹⁸ And since budget assistance is disbursed quicker, it is

⁷¹⁷ See the definition of differential treatment by PHILIPPE CULLET, *Differential Treatment in International Environmental Law* (Ashgate, 2003), 19, and on forms and instruments of differential treatment, pp. 32-36. I elaborate this thought in *infra* chapter VI.1.

⁷¹⁸ The Bank's shift to Development Policy Lending (previously known as Structural Adjustment Lending) in the 1980s is partly owed to the experience that financing specific projects alone is ineffective or insufficient in countries with weak capacities and poor policies. See CAROL LANCASTER, 'The World Bank in Africa since 1980: The Politics of Structural Adjustment Lending', in Devesh Kapur, et al. (eds), *The World Bank. Its First Half Century. Volume 2: Perspectives* (Brookings Institution, 1997).

more suitable than project lending to address urgent financing needs in times of crisis.⁷¹⁹

For the World Bank, however, budget assistance generally involves higher fiduciary, economic, and political risks than project lending, risks that can be amplified in fragile states.⁷²⁰ With resources going directly to the national budget of a country, for reform programs implemented through national systems in their entirety, the organization has fewer means of ensuring they are used effectively to achieve development objectives. It is no coincidence that budget assistance is permitted under the Articles of Agreement only under “special circumstances”, and still accounts for only 20% of overall Bank lending.⁷²¹

Two central components of the Bank’s legal regime for DPOs aim at mitigating these risks – and both make it *prima facie* unlikely that budget assistance is used in fragile states. First, more than any of the Bank’s financing instruments, DPOs are predicated on the existence of a government with capable institutions, good governance, and the political commitment to assume ownership. OP 8.60 makes the decision to provide budget assistance to a country dependent on a thorough appraisal of its policy and institutional framework, as well as commitment to propose and implement a national reform program.⁷²² Based on the CPIA, fragile states by definition score low on most of these aspects, and are less likely to fulfill the Bank’s

⁷¹⁹ For instance, the World Bank approved USD 750 million of budget support to the government of Ukraine, as the government was facing continued tensions on the eastern border with Russia in May 2014. While there were only five Development Policy Lending operations in fragile states in the fiscal years 2005-2007, by 2008, the number had already increased to almost 40. Still, fragile states received only 10% of assistance as direct budgetary contributions between 2009 and 2011, whereas the overall portion of Bank funding disbursed through budget assistance is 20%. THE WORLD BANK, '2012 Development Policy Lending Retrospective' (2013), para. 17.

⁷²⁰ THE WORLD BANK & AFRICAN DEVELOPMENT BANK, 'Providing Budget Aid in Situations of Fragility: A World Bank - African Development Bank Common Approach Paper' (2011), at 15-17; and THE WORLD BANK, '2012 Development Policy Lending Retrospective', 34-37.

⁷²¹ IDA Articles, Art. V, Sect. 1 (b). The Bank’s legal department argues that special circumstances are generally given when loans other than for specific projects are used in accordance with the productive purposes requirement of the Bank’s mandate. The Executive Directors must establish for each Development Policy operation whether this is the case. SHIHATA, *The World Bank Legal Papers*, pp. 163-167 and 179-182.

⁷²² OP 8.60 on Development Policy Lending (February, 2012), paras. 2, 3, and 5. The criteria established in OP 8.60 are further elaborated in Good Practice Notes, non-binding guidelines on various aspects of Development Policy Lending. Moreover, recipients are required to commit in a separate document annexed to the loan agreement, the so-called Letter of Development Policy, to the broad objectives and policy, institutional, or legislative measures of government programs for which they seek Bank funding. The self-commitment contained in the Letter addressed to the World Bank’s President is a prerequisite for budget assistance to be approved by the Executive Board.

general “governmental conditionality”.⁷²³ Second, budget assistance is provided only upon fulfillment of specific, mutually agreed conditions – that is, policy or institutional actions that need to be completed before disbursements are made.⁷²⁴ Countries with weak institutions and poor governance often lack the capacity to deliver on the accumulated set of conditions, or fail to attain the agreed results in circumstances of political instability or conflict. Consequently, budget assistance must be temporarily suspended or terminated.

How has the World Bank adapted its legal and policy framework to extend Development Policy Lending to fragile states?

ii. Special Considerations for Development Policy Lending in Fragile States

In order to facilitate the extension of Development Policy Lending to post-conflict and fragile states, the World Bank has introduced an exceptional provision in OP 8.60 in 2004.⁷²⁵ In “crisis and post-conflict situations”, where countries may need rapid assistance, but lack the capacity to design Development Policy operations that meet the usual requirements, budget assistance may be approved by the Executive Boards “on an exceptional basis”.⁷²⁶ Bank staff must therefore explain in the program document when and how the usual requirements – e.g. environmental standards, fiduciary arrangements, or requirements to consult national stakeholders outside of

⁷²³ DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 417. Whereas SALs relied on relatively specific “policy-change conditionality”, the Bank later began to shift to “policy-level conditionality”, in the sense of aid selectivity based on the existence of a good policy and institutional framework and country ownership. See RAUL HOPKINS, et al., ‘The World Bank, Conditionality, and the Comprehensive Development Framework’, in Christopher L. Gilbert & David Vines (eds), *The World Bank. Structure and Policies* (Cambridge University Press, 2000), 288. On the CPIA-based classification of fragile states, see *supra* section 2 of this chapter.

⁷²⁴ OP 8.60, para. 13 (Conditions): “The Bank makes the loan funds available to the borrower upon maintenance of an adequate macroeconomic policy framework, implementation of the overall program in a manner satisfactory to the Bank, and compliance with these critical program conditions.” The Bank supervises the implementation of government programs supported through Development Policy Lending and verifies the fulfillment of the agreed conditions.

⁷²⁵ OP 8.60 replaced Operational Directive OD 8.60 of December 1992, which contained no such exception. The old Directive instead explicitly stated “Adjustment lending is not advisable when the political commitment to adjustment is weak or highly uncertain”, which could be determined on the basis of the “capacity and willingness of country authorities to prepare acceptable Letters of Development Policy.” (para. 39).

⁷²⁶ OP 8.60, para. 32. The term “crisis” here refers to financial crisis “with substantial structural and social dimensions”, or economic shocks. Post-conflict countries are those with urgent reconstruction needs but lacking a medium-term reform agenda usually required for the Bank to assess the government’s policies and commitment.

the government – would be addressed at a later stage. Besides defining situations of “crisis” and “post-conflict”, neither the Policy, nor the according Bank Procedures specify decision-making parameters or procedures to be followed.

More elaborate, though non-binding guidance is contained in the Good Practice Note for Development Policy Operations in Fragile States, which was prepared by Bank staff in 2005.⁷²⁷ Accordingly, the use of budget assistance should be considered once a country has a legitimate government, adopted a budget, and has a reasonably functioning treasury system. In addition, the Note makes specific recommendations for adapting the design and implementation of Development Policy Operations to the weak capacity and volatile environment of fragile states, namely, using fewer performance- or outcome-based conditionality, and contemplating the consequences for the country’s stability before suspending aid flows in response to non-compliance. In turn, the risks of providing budget assistance to fragile states should be managed through more rigorous *ex ante* analysis, additional safeguards, and intensified monitoring.⁷²⁸ Similar recommendations were later formulated in a Common Approach Paper of the World Bank and African Development Bank.⁷²⁹

Based on the exceptional provision in OP 8.60, and following the specific guidance laid out in the Good Practice Note and Common Approach Paper, the World Bank has developed an organizational practice of using budget assistance as a state-building tool in the high-risk environments of fragile states. In essence, the Bank therefore appears prepared to consider capable institutions, good governance, and strong ownership on the part of national governments not as preconditions, but objectives of Development Policy Lending.

c) Program-for-Results Financing – A Flexible Legal Framework

i. Background

In early 2012, the World Bank introduced a new financing instrument, Program-for-Results Financing (PforR). The new instrument was developed in the context of the

⁷²⁷ THE WORLD BANK, 'Good Practice Note for Development Policy Lending. Development Policy Operations and Program Conditionality in Fragile States'.

⁷²⁸ Ibid., paras. 47-50.

⁷²⁹ THE WORLD BANK & AFRICAN DEVELOPMENT BANK, 'Providing Budget Aid in Situations of Fragility: A World Bank - African Development Bank Common Approach Paper', 11.

World Bank's investment lending reforms,⁷³⁰ and in response to recipients demands for less bureaucratic and cumbersome, more program-based and country-owned financing.⁷³¹ PfoR is a true novelty in the toolbox of development finance: the Bank supports government programs, not specific projects or development policies. The programs are those of the recipient government, governed by national laws and implemented through country systems.⁷³² The World Bank only provides co-funding, and its role is focused on providing capacity-building and implementation support. Most importantly, the disbursement of funds is directly linked to the achievement of concrete results. Since PfoR accordingly differs both from investment project and development policy operations, the Board of Directors approved a new OP/BP 9.00, which forms the core of the legal regime for PfoR operations.⁷³³

OP/BP 9.00 was drafted at a time where fragile states had already achieved full prominence on the World Bank's agenda, and the shortcomings of traditional aid instruments vis-à-vis fragile states were widely acknowledged. Hence, it is little surprising that it is the first of the Bank's internally binding rules to explicitly refer to "fragile states".⁷³⁴ More importantly, from the outset, the rules and procedures for PfoR financing contain some notable features that have the potential of making the instrument particularly suitable for states with very weak capacities.

ii. *General Provisions that Facilitate PfoR Operations in Fragile States*

Among the most outstanding features of the legal framework for PfoR is its adaptability to different contexts, and countries with different stages of development. This adaptability is reflected not just in the fact that PfoR financing can be provided as grants or loans, for small and large programs, and for programs that are carried out

⁷³⁰ *Supra* note 707.

⁷³¹ At a time where the emergence of new (non-traditional) donors and new (private or public-private) sources of financing are rapidly changing the international aid landscape in which the World Bank offers its services, the organization was pressured to respond to the demands of its clients. See THE WORLD BANK, 'A New Instrument to Advance Development Effectiveness: Program-for-Results Financing' (December 29, 2011), paras. 8 and 14-15.

⁷³² In particular, PfoR is very much a brainchild of the Paris aid effectiveness agenda, and provides donors with a tool to increase the results-focus, effectiveness and leverage of their funds. On the considerations leading to the adoption of PfoR and its design features in detail, see *ibid.*, paras. 16-24.

⁷³³ For an early, legal analysis of the legal framework for PfoR, from which the present section draws extensively, see DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, chapter 8.

⁷³⁴ Operational Policy and Bank Procedures 9.00 on Program-for-Results Financing (February 2012), para. 8 lit. (f).

by nongovernmental or governmental parties.⁷³⁵ More importantly, the instrument appears suitable for countries with weak institutions since with OP/BP 9.00, the Bank shifts the emphasis from *ex ante* requirements to ongoing and *ex post* controls, and focuses on building a country's capacity.

Ex ante requirements still exist for PforR lending, and the Bank assesses the adequacy of country systems – i.e. national institutions and laws – based on its standards of economic effectiveness, financial management, and environmental and social protection.⁷³⁶ Yet the organization uses only a lighter, 'core standards' version of the comprehensive standards contained in the environmental and social safeguards.⁷³⁷ Its financial management and procurement guidelines do not apply to co-financed government programs.⁷³⁸ Moreover, the results of the Bank's *ex ante* assessments are understood as reference point for monitoring, and a benchmark for identifying activities that are necessary to strengthen the relevant national capacities and arrangements.⁷³⁹ Where country systems currently fall behind these standards, the country is not automatically excluded from financing. Instead, the Bank provides implementation support through activities that are aimed precisely at strengthening country systems in areas where its assessments have identified.⁷⁴⁰

Against this background, a dominant concern surrounding the adoption of OP 9.00 was that the Bank would abandon its own financial management, social, and environmental standards when relying on country systems.⁷⁴¹ Yet, it is particularly in those countries with weak institutions and lower standards that the Policy's approach also presents an opportunity. By using country systems for implementation, rather

⁷³⁵ OP 9.00, paras. 2 and 3.

⁷³⁶ OP 9.00 paras. 5-10 and BP 9.00 para. 9, referring to paras. 19-32.

⁷³⁷ The core standards deduced from the Bank's comprehensive set of safeguard policies are condensed into one paragraph, OP 9.00, para. 8. Moreover, these standards are considered only to the extent that they are "applicable or relevant in a particular country, sector, or Program circumstances". Programs that could have "significant adverse impacts" on the environment or affected people are, however, generally excluded from PforR Financing.

⁷³⁸ OP 9.00, para. 7.

⁷³⁹ BP 9.00, paras. 27 and 30. As part of implementation support, the Bank provides technical assistance for capacity- and institution-building in a broad range of areas, including fiduciary, environmental and social systems. See THE WORLD BANK, 'A New Instrument to Advance Development Effectiveness: Program-for-Results Financing', para. 100.

⁷⁴⁰ OP 9.00 paras. 1 lit. c) and 12; BP 9.00 para 30, which foresees that the Bank identifies the aspects of a country's environmental and social systems that require strengthening, which can become part of the Program's action plan and will be taken on during preparation and implementation of the program.

⁷⁴¹ See THE WORLD BANK, 'A New Instrument to Advance Development Effectiveness: Program-for-Results Financing', Annex A: Summary of Consultations, paras. 6, 9. Or The Guardian, Poverty Matters Blog: NGOs criticize World Bank Lending (October 21, 2011), available online: <http://www.guardian.co.uk/global-development/poverty-matters/2011/oct/21/ngos-criticise-world-bank-lending> (accessed December 2014).

than insisting on its own standards and procedures from the outset, the Bank can focus on strengthening the country's capacity to maintain standards in the medium-term, and in the entire government program.⁷⁴² Capacity-building is a key objective of PfoR, and achieving the standards outlined in OP/BP 9.00 accordingly becomes the objective of Bank assistance, rather than a precondition.

Moreover, OP 9.00 seeks to balance the risk of using country systems and overall simplified *ex ante* requirements by putting more emphasis on *ex post* controls, namely more rigorous monitoring and results-oriented controls during implementation.⁷⁴³ The central feature of PfoR is that disbursements of Bank funds depend on the achievement of results, which are measured on the basis of "specific, measureable, and verifiable" indicators. Indicators are formulated by recipients and assessed by the Bank.⁷⁴⁴ The major burden for recipient countries under the PfoR regime consequently consists in preparing credible results frameworks, designing appropriate indicators, and, above all, monitoring, achieving, and verifying achievement. This is no easy task, considering the limited availability and reliability of data particularly in fragile states.

A last feature of the legal regime for PfoR that is particularly notable with regards to fragile states, where the abrupt suspensions of aid flows can cause significant, negative disruptions, concerns the handling of non-compliance. If a country fails to fulfill its obligations, the Bank can refer to the same legal remedies as applicable to other financing instruments. However, OP 9.00 commits the organization to exercise self-restraint, using remedies only after having paid due regard to the country- and program-specific circumstances, the severity of non-compliance, and a country's commitment to tackle the identified problems, for which the Bank first engages in consultations with the country.⁷⁴⁵ Certainly, the World Bank has generally refrained

⁷⁴² See also the formulation in *ibid.*, para. 20, recognizing that "while maintaining the Bank's overall commitment to high international standards, Program-for-Results will not seek procedural equivalency to the Bank's policies and procedures designed for IL operations."

⁷⁴³ OP 9.00, para. 9; BP 9.00, para. 5. Commensurate to the recipient country's capacities, the Bank continues its own risk assessments and monitoring during implementation, particularly to prevent and mitigate fraud and corruption. In connection with OP 9.00, the Bank has therefore adopted Guidelines on Preventing and Combating Fraud and Corruption, which become binding through the reference made in OP 9.00, para. 15.

⁷⁴⁴ BP 9.00, paras. 13 and 34 and note 10

⁷⁴⁵ OP 9.00 para. 14 and BP 9.00 para. 43. Also THE WORLD BANK, 'A New Instrument to Advance Development Effectiveness: Program-for-Results Financing', para. 78.

from automatically using its legal remedies – OP/BP 9.00, however, codifies this informal, organizational practice.⁷⁴⁶

d) Comparison and Evaluation

Three Operational Policies – OP 10.00 on Investment Project Financing, OP 8.60 on Development Policy Lending, and OP 9.00 on Program-for-Results Financing – regulate how the bulk of the World Bank’s lending operations are planned, approved, and implemented. The Policies determine under what conditions recipient countries get access to the Bank’s resources, and what roles and responsibilities they assume in the process of development cooperation.⁷⁴⁷ How, and to what effect has the World Bank sought to adapt this regulatory framework for operations in weak capacity, high-risk environments?

In designing a more agile framework for engaging in fragile states, the World Bank has taken a different approach for each of its three financial instruments. OP 10.00 on Investment Project Financing has recently undergone a major overhaul. In this context, the Bank has introduced a new section that allows for the use of exceptional arrangements when planning and implementing operations in conflict-affected or fragile states.⁷⁴⁸ The organization has thus mainstreamed exceptions that were previously available only under its emergency policy – though it had long become an organizational practice to make ample use thereof outside of traditional emergencies.⁷⁴⁹ In the past, staff often relied on an overly broad interpretation of the condition of state fragility as an instance of emergency in order to trigger OP 8.00. In contrast, the new OP 10.00 formalizes and makes transparent under what conditions a

⁷⁴⁶ RIGO SUREDA, 'Informality and Effectiveness in the Operation of the International Bank for Reconstruction and Development', 585-588, arguing that the World Bank has been reluctant to use its legal remedies, and hardly any loan was suspended up to the 1970s. While the organization has since shown more ready to suspend loans on the grounds of non-performance or non-compliance with contractual obligations, it has often preferred to reach an informal agreement with the recipient country. Recipients agree not to make withdrawals until the causes giving rise to legal remedies have been removed.

⁷⁴⁷ Besides, Operational Policy 2.30 provides an overarching framework to guide the Bank’s work in countries affected by or in transition from conflict. OP 2.30 establishes a number of general principles, but does not affect the rules whereby operations are planned and implemented. On OP 2.30, see *supra* section 3 a) of this chapter.

⁷⁴⁸ Examples of Bank operations “in situations of urgent need or capacity constraints” include an involvement in the CAR to support a food response and to pay salaries of public servants; an operation in Somalia equally to pay salaries of public servants; and Bank support to the reconstruction of Northern Mali.

⁷⁴⁹ See *supra* note 701.

member state can qualify for special considerations. Exceptional arrangements must be requested by the recipient country and approved by the Bank's Management, on the basis of objective, detailed eligibility criteria, and following a process of internal consultations. The revision of OP 10.00 has thus the potential to strengthen the consistency, predictability, and transparency of the Bank's decision-making.

In contrast to the relatively comprehensive, exceptional regime available for Investment Project Financing in fragile states, OP 8.60 on Development Policy Lending contains only one, broad provision concerning crisis and post-conflict situations. It enables the Bank to put aside certain requirements in order to use budget assistance on an exceptional basis, if approved by the Executive Board. Which design considerations can be put aside, and under what conditions, is not regulated in detail, but apparently determined on a case-by-case basis. In principle, this room for discretion can facilitate a flexible and country-specific approach to tailor DPOs to the specific constraints of fragile states, which is the objective of the accompanying Good Practice Note. In practice, however, when the World Bank is prepared to provide funding directly to a country's budget is thus not necessarily predictable and consistent. A study commissioned by the German Ministry for Development criticized that most operations were conducted in states that also received exceptional resource allocations from the IDA.⁷⁵⁰ The according imbalance within the group of fragile states was difficult to explain on the basis of technical considerations alone, and suggests that the decision to use budget assistance could be politically influenced.⁷⁵¹ This is while the decision to channel resources directly to a country's budget has significant consequences for the countries concerned, since it is usually seen as a signal of political endorsement.

In turn, OP 9.00 on Program-for-Results Financing does not contain any special provisions for fragile and conflict-affected. The Policy does, however, establish a legal framework for Bank operations that appears more flexible and adaptable to different circumstances in recipient countries, including fragile states. Notably, due to

⁷⁵⁰ FOLZ & LEONHARDT, *The Engagement of the International Development Association in Fragile States. Proposals for a Reform Agenda*, 41-43, suggesting that the World Bank develops clear criteria for determining when it considers project lending the only adequate financing instrument in fragile states, and accordingly rules out the use of budget assistance. Between Fiscal Year 2006 and 2009, the World Bank implemented 13 Development Policy Operations in nine countries: in Afghanistan, Burundi, the Central African Republic, Côte d'Ivoire, Haiti, Laos, Liberia, Sierra Leone, and Togo.

⁷⁵¹ At least prior to the introduction of a new exceptional allocation regime for "turn-around" situations in 2014, exceptional allocations of IDA resources were considered "complex, opaque and prone to arbitrariness" See *supra* note 587, and in detail, section 2 b) of this chapter.

the novelty of the instrument and the scarcity of implementation experience,⁷⁵² it is too early to assess the suitability of PfoR financing for conflict-affected and fragile states in practice.⁷⁵³

Judged on the basis of the three Policies, the World Bank's approach thus reveals some patterns, but remains little systematic overall. For all types of operations, the Bank has sought to make its legal and policy framework more flexible and give recognition to the fact that its "clients" have significantly different capacities. It has avoided the use of differential treatment for a clearly defined group of countries, as does, for instance, the World Trade Organization (WTO) for Least Developed Countries (LDCs).⁷⁵⁴ Instead, to acknowledge that fragility may occur in otherwise stable or middle-income countries, the Bank has preferred a situations-based approach, and used differential treatment in any country that faces specific constraints or circumstances.⁷⁵⁵ While OP 10.00 was accordingly revised to establish a detailed, exceptional regime, OP 9.00 instead counts on establishing a legal framework flexible enough to be used in any country or situation. OP 8.60 contains only one rather vague provision that enables the exceptional use of budget assistance, but leaves the details of when and how to be sorted out in practice. Considering these differences, it is not clear to what extent the World Bank deems fragile states to require a systematic and targeted response – or rather aims to make its legal and policy framework generally more flexible. After all, we have seen that there is a larger trend at the World Bank that favors a principles-based approach over adhesion to strict rules, and instead of rigid, *ex ante* requirements, puts more emphasis on implementation assistance and building the capacity of states to meet standards.⁷⁵⁶

To what effect has the organization adapted the rules that regulate how development projects and programs are approved, planned, and implemented? To address this question, I refer again to three fundamental provisions of the Articles of

⁷⁵² PfoR was introduced in 2012 without broad prior piloting. To limit its risks, the World Bank decided to provide only a maximum of 5% of IDA or IBRD funding through the new instrument during the first two years. Management reviews the implementation of the policy, publishes a progress report, and engages in discussions with the Executive Directors. At the time of writing, this process was still ongoing.

⁷⁵³ Arguably, the success of results-based disbursements in fragile states ultimately depends on the use of realistic indicators that are commensurate to the countries' limited capacities, so as not to cause the abrupt suspension of aid in the case of non-compliance.

⁷⁵⁴ See, for instance, HENNING JESSEN, *WTO-Recht und "Entwicklungsländer"* (Berliner Wissenschafts-Verlag, 2006); and on the concept of differential treatment, *infra* chapter VI.1.

⁷⁵⁵ On the minor role of the classification of fragile states in guiding the World Bank's operational decision-making, see already *supra* section 2 b) of this chapter.

⁷⁵⁶ See already *supra* section 1 b) of this chapter, and for a discussion, *infra* chapter VI.1.

Agreement – the objective of development, standards of effectiveness, and the political prohibition clause. As noted before, the World Bank increasingly understands peace- and state-building objectives as part of its core development mandate.⁷⁵⁷ The Bank has therefore become more prepared to take risks, and to postpone or put aside some of its substantive and procedural requirements in order to engage in conflict-affected and fragile states. Arguably, the World Bank has even prioritized the objectives of preventing or mitigating conflict and building capable and legitimate states over other development objectives. For instance, OP 8.60 allows staff to put aside certain design considerations that aim to ensure that budget assistance does not just further development, but equitable, broad-based, and sustainable development.⁷⁵⁸ Under OP 10.00, environmental and social requirements for project lending can be postponed to the implementation phase, so that the organization can finance projects in countries in urgent need of assistance or facing capacity constraints. At least in the short term, the ability to respond rapidly to conflicts and crises, or to stay engaged and contribute to state-building under the most difficult circumstances, can thus override other concerns relating to the outcomes of development cooperation. This prioritization in the context of fragile states is in line with the OECD's Fragile States Principles, and the Bank's commitments under the New Deal.⁷⁵⁹

How does the World Bank strike a balance between the need for a rapid response, and ensuring the effectiveness of its operations? The Articles of Agreement require the IDA not only to ensure the purposive use of resources, but also their effective use – and many provisions of the three Policies that regulate the Bank's financing instruments serve precisely this objective.⁷⁶⁰ As OP 10.00 and OP 8.60 were adapted to ease some of these requirements in order to facilitate, speed up, or otherwise enhance operations in fragile states, the risk that resources are misappropriated or not used effectively could increase. Yet, the Articles do not specify the means through which the World Bank must ensure that its resources are used effectively. Based on OP 10.00 and OP 8.60, the World Bank compensates for the postponement or reduction of certain *ex ante*, fiduciary requirements with intensified *ex post*

⁷⁵⁷ See *supra* section 1 b) of this chapter.

⁷⁵⁸ OP 8.60, para. 32, suspending design considerations that relate to the distributional effects or effects on natural resources and the environment of operations.

⁷⁵⁹ On the objective of state-building prioritized in the Fragile States Principles and the New Deal, see *supra* chapter II.3 a).

⁷⁶⁰ On standards of effectiveness in the Bank's legal framework, see *supra* section 1 b) of this chapter.

controls.⁷⁶¹ A similar a model is also set forth in OP 9.00 for Program-for-Results operations, though not specifically for fragile states. Weaknesses and according risks that the Bank identifies in its *ex ante* assessment of a country's systems are addressed through specific capacity-building measures and supervision arrangements during implementation.⁷⁶² In essence, the World Bank thus shifts to an approach that strives not to avoid, but to better manage the risks associated with working in fragile states.⁷⁶³ This shift has been codified in internal rules, while an interpretation of the meaning and scope of the Articles' fiduciary duty in light of the risk-management credo is still pending.⁷⁶⁴

It remains to consider how the changes introduced in OP 10.00 and OP 8.60 relate to the protection of sovereignty in the legal and policy framework of the World Bank.⁷⁶⁵ Looking at the political prohibition clause as a protection of recipient autonomy in the development-process, it is notable that OP 10.00 permits the Bank to implement certain activities on behalf of the country, or enter into agreements with third parties for that purpose.⁷⁶⁶ In the latter case, the Bank provides funding not directly to the government as it usually does, but instead to international organizations (mostly the UN) or NGOs.⁷⁶⁷ It is no news that in practice, the World Bank regularly assumes a "more hands-on approach of assisting counterparts" in countries that lack the capacity to conceive and implement development projects and programs single-

⁷⁶¹ Besides, the use of trust fund arrangements instead of the Bank's normal lending instruments can be seen as an alternative strategy to ensure the effective use of resources in fragile and conflict-affected states. See *supra* section 3 a) and c) of this chapter.

⁷⁶² OP 9.00, para. 12.

⁷⁶³ While particularly relevant for operations in fragile states, the credo that risks need to be managed, not avoided, also constitutes a pillar of the Bank's updated Governance and Anticorruption strategy (*supra* note 560), and the subject of the 2014 WDR, THE WORLD BANK, 'Word Development Report. Risk and Opportunity. Managing Risk for Development' (2014). Notably, given the Bank's institutional culture that is often accused of being front-loaded and neglecting implementation, it remains to be seen whether the shift from *ex ante* requirements to *ex post* controls materializes in practice.

⁷⁶⁴ *Supra* note 557.

⁷⁶⁵ OP 9.00 includes no specific provisions for fragile states. Since PfoR finances government programs that are implemented through country systems, it is generally supportive of recipient ownership.

⁷⁶⁶ Where governments request the Bank to execute certain activities on their behalf, this is usually accomplished using financing from trust funds like the SPF, which can support knowledge-related activities, but also fund the preparation and supervision of smaller projects. For an overview of SPF-funded activities, see THE WORLD BANK, 'State and Peacebuilding Fund Progress Report' (May 21, 2009).

⁷⁶⁷ For example, the majority of Bank-financed projects in Somalia rely on alternative implementation arrangements, often UN agencies. It was also considered to hire a third party monitoring agent independent of the national government, which can ensure and validate project delivery to allow the Bank and the UN to better oversee the use of their funds. THE WORLD BANK, 'Interim Strategy Note for the Federal Republic of Somalia' (November 11, 2013), paras. 56.

handedly.⁷⁶⁸ Seeing arrangements that *prima facie* reduce recipient ownership of the development process codified in an Operational Policy is perhaps more unusual.⁷⁶⁹ However, the revised OP 10.00 permits the use of alternative implementation arrangements only at the request of the government, and the Bank is at the same time required to strengthen the government's ability to implement in the medium term. While prepared to substitute for national governments for as long as necessary to establish or restore national capacity, the overriding objective thus remains fostering the capacity and ownership of national institutions – that is, state-building.⁷⁷⁰

The World Bank increasingly seeks to support state-building objectives through DPOs, too. OP 8.60 therefore permits the exceptional use of budget assistance in countries that fail to meet the usual *ex ante* requirements in terms of institutional capacity and commitment to assume ownership. Arguably, ownership thus turns from a precondition into an objective of DPOs in fragile states. It must be noted, however, that the World Bank generally wields considerable influence in supporting domestic policy and institutional reforms through conditionality.⁷⁷¹ The Bank's leverage vis-à-vis nascent post-conflict governments with limited capacity and domestic support is even greater.⁷⁷² In this context, broad-based ownership of domestic reform programs, though always difficult to assess for external actors, appears crucial – and yet it is one of the requirements that OP 8.60 permits the Bank to dispense with in fragile states.⁷⁷³

Looking at the political prohibition clause and the changes introduced in OP 10.00 and OP 8.60 prompts one further question. Both Policies make exceptional provisions for fragile and conflict-affected states, which can thus be treated differently from other member states. Differential treatment concerns the level of

⁷⁶⁸ THE WORLD BANK, 'IDA 15. Operational Approaches and Financing in Fragile States' (June 2007), para. 25.

⁷⁶⁹ Notably, prior to the revision of OP 10.00, alternative implementation arrangements could already be used for emergency operations under OP 8.00.

⁷⁷⁰ I discuss the shift to state-building as a strategic objective and regulatory theme in *infra* chapter VI.1.

⁷⁷¹ For an assessment of the instrument of budget support in light of recipients' collective autonomy, see DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 426-428, concluding that "the level of autonomy in budget support depends on the individual case and the "strength" of the recipient".

⁷⁷² Working with the nascent government of a post-conflict country is thus not necessarily a guarantee for local ownership. See, for instance, MATTHEW SAUL, 'Local Ownership of Post-Conflict Reconstruction in International Law: The Initiation of International Involvement' *Journal of Conflict & Security Law*, 1 (2011); and criticizing the Bank's extraordinary influence in supporting domestic reforms in post-conflict countries, BOON, "'Open for Business": International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law' (*supra* note 777).

⁷⁷³ OP 8.60, para. 32.

requirements that need to be fulfilled, at what point in time, and in the case of OP 10.00, also extends to the use of different implementation arrangements. Does the political prohibition in the Articles of Agreement encompass a duty for the Bank to treat all member states equally, which would forbid the use of differential treatment?

The political prohibition does not only permit interference in the political affairs of member states, but also requires the organization to be impartial in its considerations.⁷⁷⁴ In this sense, the clause perhaps entails a duty to treat all member states equally with regards to their political character. It does not, however, extend to economic considerations that are covered by the stated purposes of the organization. Economic considerations can actually require the Bank to differentiate not just concerning the pricing of loans, but also the choice of financing instrument, or implementation arrangements.⁷⁷⁵ Accordingly, the Articles do not provide strong footing for a strict principle of equal treatment of all member states.⁷⁷⁶

Against this background, the question of equal treatment only directs our attention to an important accomplishment of the new OP 10.00 – in comparison with the Bank’s previous organizational practice, and also with OP 8.60. As noted before, OP 10.00 formalizes and makes transparent under what conditions a member state – any member state, at any time – can qualify for special considerations. The Policy thus reduces the likelihood that differential treatment is extended in an inconsistent manner, to one member state but not another, on the basis of political and not economic considerations.

5. Conclusion

In this chapter, I investigated the processes and outcomes of how the World Bank has adapted its legal and policy framework vis-à-vis fragile states. I began by outlining how internal rule-making and dynamic interpretations of the Articles have paved the way for the organization to become concerned with state-building in fragile

⁷⁷⁴ *Supra* note 558.

⁷⁷⁵ For instance, the World Bank differentiates between countries eligible for IDA’s concessional loans or only IBRD loans. Some IDA-eligible countries receive loans with different maturities, and others can receive non-refundable grants. On differentiation between recipient countries at the operational level, see also DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 207-209.

⁷⁷⁶ Also GUDER, *The Administration of Debt Relief by the International Financial Institutions. A Legal Reconstruction of the HIPC Initiative*, 158-161; and *supra* chapter III.2.

states. I examined how the World Bank classifies fragile states, and found that the classification has no legal consequences concerning the Bank's operational decision-making or resource allocation. On this basis, I engaged in a systematic reconstruction of the mostly internal rules that govern how the World Bank negotiates, plans, and implements development assistance – analyzing to what extent they are premised on the existence of effective government counterparts, and were therefore adapted to facilitate engagement in countries with very weak or no government.

What emerges from this analysis, and what does it tell us about the World Bank's approach to fragile states? To begin with, it is safe to say that the Bank has successfully extended its mandate and area of engagement – both in geographic, and in thematic terms. It is by now well-established that peace, security, and functioning state institutions are preconditions for development, and arguably, that a predominantly technical development organization like the World Bank has a role to play in (more or less internally-driven) processes of state-building. For example, the 2013 IEG review of the World Bank's engagement with fragile and conflict affected states no longer raises the same, fundamental question as the 2006 IEG review of the LICUS initiative did.⁷⁷⁷ Since the Bank increasingly understands state fragility as a matter not just of weak state capacity, but weak state-society relations, it remains to be seen how far the organization will go in embracing an openly political agenda, assisting countries in fostering political settlements and building legitimate institutions.⁷⁷⁸ For now, state-building remains a rather state-centric enterprise, and the Bank thus attuned to working with governments – though not only effective governments.

⁷⁷⁷ INDEPENDENT EVALUATION GROUP, *World Bank Assistance to Low-Income Fragile- and Conflict Affected States*. In contrast, the LICUS evaluation had questioned what the Bank's declared state-building objective entailed; whether it was aware of the political and ideological connotations of such an agenda; and whether it had a response to the central state-building dilemma of balancing support for central government and non-state actors. INDEPENDENT EVALUATION GROUP, The World Bank, *Engaging with Fragile States. An IEG Review of World Bank Support to Low-Income Countries under Stress* (2006), 26. Nevertheless, critical voices remain, questioning the Bank's competence and/or legitimacy to engage in the highly politicized environments of fragile and conflict-affected states. See, for instance, NOORUDDIN & FLORES, 'Financing the Peace: Evaluating World Bank Post-Conflict Assistance Programs', arguing that the Bank had no positive effect on recovery in post-conflict settings, but did not worsen the situation either (22-23); or BOON, "'Open for Business': International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law", 515, stating that the "absence of representative and functioning governmental counterparts that can bargain over proposed policy and legislative changes" made any type of Bank engagement in post-conflict environments per se more intrusive.

⁷⁷⁸ THE WORLD BANK, *World Development Report: Conflict, Security, and Development*, at 84.

The concern with state-building in fragile states has come with an increasing acknowledgement that institutional capacities in many areas required by the Bank first need to be established or strengthened, and are in that sense rather ill-suited as conditions for assistance. What does this mean, for instance, for standards of effectiveness that the World Bank is required to uphold? As illustrated, they often translate into *ex ante* requirements concerning a country's public financial management, fiduciary, and procurement systems, requirements that have often prevented or complicated engagement in countries with weak capacities. Broadly speaking, the World Bank has responded to this challenge not by abandoning its standards, but by shifting to a decidedly different approach: reducing strict *ex ante* requirements in favor of differentiated requirements or generally more flexible, principles-based regulation, while placing more emphasis on implementation assistance and capacity-building. To say it in the language of the Bank: it has moved from risk avoidance to risk management, through regulatory adaptations that have yet to show effect on its institutional culture.⁷⁷⁹

A more complex picture emerges when considering how the Bank's approach to engaging with fragile states relates to the basic idea of recipient sovereignty, expressed, for example, in the political prohibition clause. In the most extreme and exceptional cases, there is not even a government to refer to. This has led the World Bank to adopt an internal rule, OP 2.30, which allows it to engage upon the request of the international community instead – arguably, a similarly extreme and exceptional departure from the principle of sovereignty enshrined in its mandate. At the same time, Bank staff are not formally required to engage with sub-national or non-state actors in the absence of a government capable of representing the population.⁷⁸⁰ Beyond – and with the consent of the government – the Bank has modified the legal framework for project lending to allow it to entrust other international organizations or NGOs with implementing projects and programs in countries with insufficient capacity for implementation. Whereas ownership of the government may be reduced somewhat as a consequence, the relevant rule (OP 10.00) also requires staff to invest in capacity-building and thus foster the conditions for full government ownership.

⁷⁷⁹ *Supra* note 763.

⁷⁸⁰ In practice, the World Bank has often sought to consult and involve actors outside of the government, e.g. civil society representatives or local community stakeholders, e.g. in Somalia and East Timor. From an operational as well as a legal perspective, however, engaging with non-state actors remains a “frontier issue” for the World Bank. CISSÉ, 'Should the Political Prohibition in Charters of International Financial Institutions be Revisited? The Case of the World Bank', 63.

Against this background, it is difficult to say whether from the perspective of recipients, being seen as a fragile state constitutes an advantage or rather a disadvantage. How the Bank has remodeled some of its internal rules to more effectively engage with fragile states has certainly affected the terms and conditions upon which they receive, participate, and command over the use of development funding. Access to the Bank's resources is facilitated through an extension of the legal basis for engagement, and through the lifting or postponing of certain requirements that recipient governments are expected to fulfill to be eligible for funding. Potential recipient countries could benefit from such modifications, in so far as they require assistance but have previously been unable to fulfill the Bank's terms and conditions. At the same time, we have seen that how the Bank has adapted its legal and policy framework may concern not just the requirements that fragile state must meet, but also the right to consent and to "own" the development process. The said omission of state consent as a legal basis for engagement is certainly an exceptional case. Nonetheless, the impression that national ownership is not unconditional and may necessarily turn into an objective to be reached can be traced throughout the Bank's engagement with fragile states. In some instances, internal rules thereby serve to condition the roles and responsibilities usually accorded to national governments in the process of development cooperation on the government's effectiveness.

Another reason why it is so difficult to say whether being seen as fragile state constitutes an advantage or disadvantage has to do with the way the World Bank has been adapting its legal and policy framework. In many regards, the Bank has shown a preference for not responding *ad hoc*, but consolidating emerging practices. It has done so through mostly internal and only partly formalized processes of rule-making, sometimes codifying implied interpretations. At the same time, we have seen that the Bank's response is far from systematic, and often rests on rules that are formulated in ambiguous terms, leaving considerable discretion to decision-makers, be it the Executive Board or Management. Whether such rules provide practical guidance and enhance the predictability and consistency of decision-making is not always clear. Nor is it clear whether the World Bank actually seeks to systematically adapt to the special circumstances and needs of fragile states, or rather to evade certain mandate constraints to engage in countries that are of particular concern to its major shareholders.

We will return later to a discussion of the potentials and perils of regulation in instructing and formalizing a differentiated approach to dealing with fragile states. For now, we can maintain that an analysis of the World Bank has provided sufficient evidence for both, the potentials and perils, to be able to say that the answer (as always) depends – in this case, on the design of rules and the rule-making process.

V. The African Development Bank, the Asian Development Bank, and the European Union – A Short Comparison with the World Bank

The World Bank is not the only international development organization that has come to acknowledge and respond to the specific challenges of engaging with fragile states. Fragile states have emerged as a key priority for the international development community as a whole. Inasmuch as other organizations operate on the premise that recipient countries have an effective government, they, too, face difficulties in fragile environments. Many have also sought to respond with strategic and operational reforms that concern the design, management, and delivery of ODA vis-à-vis fragile states – and ultimately, how it is governed.⁷⁸¹

To what extent and how different organizations have adapted the rules and procedures that govern their operations naturally varies. After all, a great variety of international organizations engage in development cooperation. Some have universal membership like the World Bank, some regional, like the African or Asian Development Bank. Some consist of donor and recipient countries, others only of donors, like the EU. A notable difference between the MDBs and the EU is also that the former mostly provide concessional loans, whereas the EU usually provides financing in the form of grants. Accordingly, despite some notable commonalities in the law of development organizations, their legal frameworks and mandates still show significant and sometimes quite fundamental differences.⁷⁸² For example, we will see that one fundamental difference consists in the fact that the World Bank, the AfDB, and the ADB, have a focused development mandate that is explicitly non-political, whereas the EU is a political organization to the core, with a much broader mandate.

It is those differences in the mandates of international organizations that largely determine what legal constraints they face when engaging in development cooperation with fragile states – and how they may respond. Besides, even if the legal constraints they face are somewhat similar, to what extent an organization chooses to address them could also depend on other factors – the interests of strong member states and their decision-making power within the organization, for example, or the

⁷⁸¹ For an overview, see already *supra* chapter II.3 b).

⁷⁸² I outline substantive commonalities in the legal frameworks of international development organizations in *supra* chapter III.2.

institutional culture of an organization more generally.⁷⁸³ In comparing the World Bank's approach towards fragile states with that of other organizations, my objective is thus not only to paint a broader picture of how the law of international development organizations is adapted vis-à-vis fragile states. The short comparison also yields a better understanding of the factors that may influence how different organizations respond – and why.

In the following chapter, I examine how, and to what effect other international development organizations have adapted their legal and policy frameworks to engage with fragile states. I begin with a closer look at the rules and practices of the African Development Bank and the Asian Development Bank, both organizations of a similar type and with mandates similar to the World Bank (V.1.). Next, I turn to the EU, which in many regards stands in marked contrast to the World Bank and the other MDBs (V.2.). Comparing apples to apples, and apples to oranges, so to speak, I conclude with a reflection on the factors that may account for the similarities and differences in their respective approach (V.3.).

1. The African Development Bank's and the Asian Development Bank's Approach To Fragile States

Like the World Bank, the African Development Bank and the Asian Development Bank are MDBs, a specific type of development organization that is concentrated on the award of loans and grants. In contrast to the World Bank, AfDB and ADB have a regional focus in their operations.⁷⁸⁴ Apart from that, however, not only are all MDBs engaged in similar types of activities, they also have a comparable organizational structure, funding mechanism, and system of (weighted) voting.⁷⁸⁵

⁷⁸³ I explore these factors in section 3 of this chapter.

⁷⁸⁴ Other so-called development banks with a regional focus (Regional Development Banks) include the Inter-American Development Bank, the European Bank for Reconstruction and Development, the Caribbean Development Bank, or the Islamic Development Bank. Partly since their regional focus implies that they have less engagement with fragile states, none of them has developed a particular strategy, policy, or instrument for that purpose.

⁷⁸⁵ Compared to the World Bank, the AfDB and the ADB are woefully understudied – not only, but also by international lawyers. See, for instance, ANDRÉS RIGO SUREDA, 'The Law Applicable to the Activities of International Development Banks', 308 *Recueil des Cours*, 13 (2004), chapter I, with a comparison of the IBRD with Regional Development Banks; ROY CULPERER, *Titans or Behemoths?*, The Multilateral Development Banks, Volume 5 (Lynne Rienner Publishers, 1997); EISUKE SUZUKI, 'Regional Development Banks', in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (Oxford University Press, April 2011), paras. 37-46; or JOHN WHITE, *Regional*

The similarities between the MDBs go back to their legal frameworks and mandates, which also have much in common regarding the substantive rules that regulate purpose and conditions of assistance to a country. As noted before, the Agreements establishing the ADB, the AfDB, and its concessional lending arm, the African Development Fund, each define their objectives of contributing to development.⁷⁸⁶ In addition, since all MDBs raise money on global financial markets and therefore depend on a good credit rating, all are bound to respect standards of effectiveness and “sound banking in their operations”.⁷⁸⁷ Perhaps most particular and characteristic, all MDBs have a political prohibition clause in their mandate, which expressly protects the sovereignty of the countries they engage with.⁷⁸⁸

The AfDB and the ADB further resemble the World Bank in that they make extensive use of internal rules to govern their operations on a daily basis. The ADB has an Operations Manual that systematically collects all of its binding operational policies and procedures.⁷⁸⁹ The AfDB has a series of policies, guidelines, and procedures, though they are overall less comprehensive and also less structured. This makes it somewhat more difficult to distinguish between rules belonging to the legal or rather the policy framework.⁷⁹⁰

Development Banks. The Asian, African and Inter-American Development Banks (Praeger Publishers, 1972), chapter 2 on the ADB and chapter 3 on the AfDB.

⁷⁸⁶ *Supra* chapter III.2. The African Development Fund is the concessional lending arm of the AfDB, which thus has the same dual structure as the World Bank (consisting of the IBRD and the IDA). In contrast, the Asian Development Bank provides loans to middle-income countries and concessional loans to developing countries at the same time, but also uses “Special Funds” for the latter, which are held separate from its ordinary capital. ADB Agreement, Art. 19 and on the separation, Art 10. In detail, see also E. PHILIP ENGLISH & HARRIS M. MULE, *The African Development Bank* (Lynne Rienner Publishers, 1996), 119.

⁷⁸⁷ AfDB Agreement, Art. 17 (1) lit. j; ADB Agreement, Art. 14 (xiv).

⁷⁸⁸ *Supra* note 279.

⁷⁸⁹ ADB’s Operations Manual is accessible online, <http://www.adb.org/documents/operations-manual> (accessed December 2014). It contains operational policies that are similar to the World Bank’s OPs but called Bank Policies (BPs), and Operational Procedures (OPs), which spell out procedural requirements like the World Bank’s BPs.

⁷⁹⁰ AfDB has no Operations Manual, though all policy documents, next to legal documents, are available online at <http://www.afdb.org/en/documents/policy-documents/> (accessed December 2014). Policy documents include sectoral policies and policies on cross-cutting issues, financing policies, and guidelines and procedures. Which of these are considered binding on the organization’s staff is not clear from their designation. AfDB’s Independent Review Mechanism (the equivalent of the World Bank’s Inspection Panel), however, is mandated to review staff compliance with its “operational policies and procedures”. See the Board Resolution instituting the Independent Review Mechanism, Resolution B/BD/2010/10 – F/BD/2010/04 (June 16, 2010), para. 11 (i).

It is at the level of these internal, secondary rules that the MDBs have been found to often emulate each other.⁷⁹¹ MDBs engage in the same types of activities and face similar challenges that were not necessarily foreseen when the organizations were first created. Accordingly, insofar as they feel the need to adopt policies and procedures to guide staff in areas of common concern, these are likely to show some resemblance. Does the same apply to their engagement with fragile states? To what extent have the AfDB and the ADB emulated the World Bank's rules and practices when engaging with fragile states?

The AfDB, the ADB, and the World Bank use a common approach to classify fragile states, namely a harmonized average of their respective CPIAs.⁷⁹² They have also agreed to work on a more harmonized approach towards involvement in fragile states, and discussed the lessons learned of working in these contexts.⁷⁹³ When it comes to adapting their legal and policy frameworks for engaging with fragile states, the rules and practices of the AfDB, the ADB, and the World Bank show notable similarities, but also differences. In the following section, I will briefly examine these similarities and differences with regards to the organizations' dealings with (in)effective government (a), and differential provisions concerning the planning and implementation of operations in fragile states (b).

a) Dealings with (In)Effective Government

Both the African and the Asian Development Bank have become increasingly engaged in fragile and conflict-affected states over the last two decades – the AfDB in Somalia and in newly independent South Sudan,⁷⁹⁴ for instance, and the ADB in East

⁷⁹¹ BOISSON DE CHAZOURNES, 'Partnerships, Emulation, and Coordination: Toward the Emergence of a Droit Commun in the Field of Development Finance'; and on the harmonization trend among the development banks, also SUZUKI, 'Regional Development Banks', paras. 73-77.

⁷⁹² *Supra* note 365. The CPIAs of all three organizations usually generate only slightly different scores, though some differences nevertheless exist. For instance, the IDA put more emphasis on governance than either of the two Regional Development Banks.

⁷⁹³ *Supra* note 402.

⁷⁹⁴ The AfDB became formally involved in Somalia as early as 2010, working with its Transitional Federal Government (*supra* note 663). In South Sudan, the AfDB has a history of engagement that commenced with the signing of the Comprehensive Peace Agreement (CPA) in 2005, i.e. six years before South Sudan became independent and a member state. Then a territory of Sudan, the AfDB provided assistance through a "one country-two systems" framework, which limited AfDB involvement to policy dialogue, technical assistance, analytical and knowledge work. When South Sudan became independent but was not yet a member state, the AfDB signed a Cooperation Agreement with the government as a legal basis for engagement. See AFRICAN DEVELOPMENT BANK, 'South Sudan Interim Country Strategy Paper 2012-2014' (October 2012), pp. 1 and 13. In contrast, the World Bank

Timor and post-conflict Afghanistan.⁷⁹⁵ Next to political instability, institutional weaknesses, and particular socio-economic vulnerabilities, one type of challenge that the AfDB and ADB sometimes encountered in such settings has to do with identifying an effective government counterpart to engage with, as required by their legal and policy frameworks. Both organizations have adopted rules and developed aid instruments that in principle allow them to engage without the request or cooperation of a formal government, and issued guidance on dealings with *de facto* governments.

The African Development Bank's Executive Board first approved Policy Guidelines for post-conflict assistance in 2001, shortly after the World Bank adopted its OP 2.30 on Development Cooperation and Conflict, which is cited therein.⁷⁹⁶ Unlike OP 2.30, however, the Policy Guidelines did not regulate how the AfDB was to engage in countries with no government in power, or in non-member states territories. With regards to the latter situation, which may become relevant when a new state emerges from conflict, the AfDB faces no restriction under its mandate anyway. The AfDB Agreement explicitly allows the Board of Governors to authorize agreements "with the authorities of African countries which have not yet attained independent status or [...] not yet acquired membership".⁷⁹⁷ But can the AfDB also engage in the absence of a government, or without its formal request?

Following the adoption of AfDB's first Fragile States Strategy in 2008, the Policy Guidelines for post-conflict assistance were superseded by the Operations Guidelines of the newly established Fragile States Facility.⁷⁹⁸ The FSF is a special financing vehicle that mainly aims at making additional resources available to fragile states, outside of their performance-based allocation. Since it was established as a legally

engaged with the non-member state South Sudan on the basis of OP 2.30, and an exceptional approval of the Executive Directors. On the World Bank's approach, see *supra* chapter IV.3 a).

⁷⁹⁵ The ADB has dealt with the government of Timor-Leste to support the development process since 1999, three years before Timor-Leste gained independence and became a member of the organization. Like the World Bank, ADB resumed its partnership with the Government of Afghanistan after a hiatus from 1980 to 2001. As of 31 December 2013, the ADB's cumulative lending amounted to more than USD 950 million. See the country informational available online, www.adb.org/countries/main (accessed December 2014).

⁷⁹⁶ AfDB, Post-Conflict Assistance Policy Guidelines (2001). Unlike the World Bank's OP 2.30, the Guidelines were not a short, focused statement, but laid out in a paper that summarized AfDB's experience in post-conflict interventions and formulated some guiding principles and recommendations.

⁷⁹⁷ AfDB Agreement, Art. 29 (2) c). Though the AfDB can generally use its resources only to support its member states just like the World Bank (see AfDB Agreement, Art. 1 and 14 (1)), the statute itself thus formulates an exception from this general rule. The AfDB relied on this exception to become engaged in South Sudan prior to becoming a member state, and therefore signed a Cooperation Agreement with the government (*supra* note 794).

⁷⁹⁸ *Supra* note 369.

autonomous trust, however, it is also subject to somewhat different rules than AfDB's normal operations.⁷⁹⁹ These rules are contained in the mandatory Operations Guidelines, which were approved by its Executive Board and establish the objectives, eligibility criteria, and implementation arrangements of the Facility.

According to the Operations Guidelines, one central principle of the FSF is to “enable the Bank to remain engaged in all fragile states”.⁸⁰⁰ To be eligible for the bulk of supplemental resources from the FSF, countries need to have “formed a functional (transitional) governmental authority broadly acceptable to stakeholders and the international community”.⁸⁰¹ Rather than enabling the AfDB to engage in countries with no government in power, the Guidelines hence establish additional requirements as to the effectiveness and legitimacy of governments that seek financing from the FSF.

The FSF has two additional financing windows with separate eligibility criteria, however, one for countries in arrears, and one targeted precisely at supporting “operations in fragile states that cannot be addressed through traditional projects and instruments”.⁸⁰² Though it involves only very limited grant resources that are mostly used for technical assistance and knowledge activities, such targeted support is not restricted to countries that have a reasonably effective and legitimate government, but can be used in all countries in conflict or prolonged crisis. Moreover, the Operations Guidelines do not explicitly require a formal government request for such targeted support activities. In contrast to AfDB's general practice of operating with and through national governments, resources from this window can even be channeled directly to non-state actors in fragile states, if approved by the Board of Executive Directors.⁸⁰³

⁷⁹⁹ See the FSF Operations Guidelines, Annex 1: Legal Note on the Fragile States Facility and the Operations Guidelines (hereinafter FSF Legal Note). I return to the legal specificities of the FSF in *infra* section 1 b) of this chapter.

⁸⁰⁰ FSF Operations Guidelines, para. 2.1.2 (ii).

⁸⁰¹ FSF Operations Guidelines, para. 3.1.3 (eligibility criteria for the Supplemental Support Window). AfDB staff should therefore candidly assess “the composition of the transitional government, whether it has support from the international community and the timetable for holding parliamentary and presidential elections”. Moreover, post-conflict countries should have signed an “internationally recognized Comprehensive Peace Agreement (CPA) or a post-crisis or reconciliation agreement.”

⁸⁰² FSF Operations Guidelines, para. 3.3.1.

⁸⁰³ FSF Operations Guidelines, para. 3.3.5 (ii). Though the smallest in financial terms, the targeted support window is also the only window for which the AfDB has issued specific guidelines, the Guidelines on Administration of the Technical Assistance and Capacity Building Program of Pillar III Operations.

With the Facility's targeted support window, the African Development Bank has thus created an (albeit small) avenue through which it can principally extend assistance to countries without explicit approval of a government – and without a request from the international community, for that matter. It is questionable, however, whether the AfDB could thus support non-state actors in one of its member countries if the government objected. Certainly, the FSF was deliberately established with separate resources and functions outside of the framework for AfDB's normal operations. In this sense, the AfDB has a similar approach as the World Bank, which uses trust fund arrangement to circumvent some of the legal restrictions concerning the use of its normal resources.⁸⁰⁴ However, independent of whether its normal resources are involved or not, the AfDB's statute still governs how the organization can relate to its member countries, and so does the political prohibition clause therein.⁸⁰⁵ While it might seem unlikely that in practice, the AfDB would illicitly support non-state actors in a member's territory if the government expressly opposed, the AfDB's Fragile States Strategy at least contemplates such a use for the FSF. The 2008 Strategy, an essential piece of its policy framework regarding fragile states, recommends non-sovereign support as a means for engaging in situations where no consensus can be reached with the government on development priorities, where there is no legitimate government, or where effective government has broken down.⁸⁰⁶

The AfDB's Emergency Relief Assistance, which is a further instrument for providing exceptional support to conflict-affected or fragile states, in turn requires government consent. According to the mandatory Policy Guidelines and Procedures for Emergency Relief Assistance, requests for emergency grants are processed upon request of the government or “upon receipt of a general appeal from United Nations (UN) Agencies to the international community”.⁸⁰⁷ Though the formulation is reminiscent of one in the World Bank's OP 2.30, the AfDB still needs “to obtain

⁸⁰⁴ On the World Bank's use of trust fund arrangements in fragile states, see *supra* chapter IV.3 a) and c). The FSF thus resembles the World Bank's SPF, whose resources can also be used to finance activities that are implemented through non-state actors directly, or by the Bank itself (*supra* note 766).

⁸⁰⁵ The FSF Legal Note expressly states that the FSF will be governed by “general principles of trusts administered by international financial institutions” (para. 2.2).

⁸⁰⁶ AFRICAN DEVELOPMENT FUND, 'Strategy for Enhanced Engagement in Fragile States', para. 2.3 and Figure I. See also the FSF Operations Guidelines, para. 3.3.5 on service delivery through non-sovereigns. The AfDB has channeled resources through non-sovereigns such as NGOs, private sector organizations, or UN agencies particularly to support service delivery in fragile states.

⁸⁰⁷ AfDB, Revised Policy Guidelines and Procedures for Emergency Relief Assistance, para. 3.1. Emergency relief is financed through a small Special Relief Fund, which is mostly an instrument of solidarity as it only provides grants of USD 1 million. Implementing agencies can again be either the government, or a UN specialized agency or NGOs.

Government's acknowledgement" before acting on a UN appeal, which is a concrete and coordinated request for humanitarian assistance. The international community's call for action as expressed in the UN appeal thus cannot substitute for the government's own approval.

In practice, the African Development Bank has used both targeted support from the FSF and Emergency Relief grants to provide assistance to Somalia following the breakdown of government.⁸⁰⁸ As noted before, the AfDB dealt with Somalia's TFG as the country's legitimate (though hardly effective) government since 2010, whereas the World Bank dealt only with Somalia's Federal Government established in 2012 – and before, on the basis of requests from the international community.⁸⁰⁹ The AfDB accordingly concluded legal agreements for the provision of targeted support from the FSF and emergency relief with the TFG, while in light of its virtually inexistent capacities, actual implementation was done by third parties.

The Asian Development Bank in turn has no internal rule concerning development cooperation and conflict, nor has it established a special facility to support fragile or conflict-affected states. However, ADB has adopted a mandatory Disaster and Emergency Assistance Policy that is applicable also in conflict-affected or post-conflict countries. In notable departure from its normal practice of engaging only upon request of a formal government, Emergency Assistance Loans can be requested by "an internationally legitimate governing authority", e.g. the UN in East Timor, or the transitional government in Afghanistan.⁸¹⁰ Using short-term and small-scale emergency loans that are not subject to normal loan terms, conditions, and policies, ADB has thus some flexibility to provide assistance to countries in the absence of a clearly identifiable, official government counterpart.⁸¹¹ While there are obvious parallels to a similar provision in the World Bank's OP 2.30, in the ADB's formulation, an extraordinary approval from the Executive Board is not foreseen. This

⁸⁰⁸ No normal lending could be extent to Somalia also because it is under the AfDB's sanctions policy for not servicing its loans since 1990.

⁸⁰⁹ See *supra* chapter IV.3 c). However, the AfDB apparently intensified its engagement in Somalia only following the joint request from Somalia's transitional government, authorities from Puntland and Somaliland, and the regional organization IGAD (Intergovernmental Authority for Development). See AFRICAN DEVELOPMENT BANK, '*Somalia Country Brief 2013-2015*'.

⁸¹⁰ ADB Disaster and Emergency Assistance Policy, OM Section D7/BP (June 15, 2004), para. 26 (i) and the according Operational Procedures (OM Section D7/OP), para. 7 (ii), both superseding ADB's previous emergency policies of 1987 and 1989.

⁸¹¹ See ADB Disaster and Emergency Assistance Policy, paras. 20-25 on the scope and conditions of Emergency Assistance Loans (EALs). Notably, though a portion of ADB's resources can also be provided in the form of grants, EALs are still loans for which the government or the "legitimate governing authority" would need to assume financial liability.

is notable in that the ADB's Executive Directors are competent to interpret the statute. Their explicit approval to operations not requested by the national government itself could have been counted as an implied interpretation of the ADB Agreement, which otherwise forbids any interference with the political affairs of member states.⁸¹²

Finally, both the African and the Asian Development Bank have also issued specific guidance on how to deal with *de facto* governments. Here, the regional development banks more closely emulate the World Bank. The guidelines prepared by the AfDB and ADB in large parts use the same wording as OP 7.30 on "Dealings with *De Facto* Governments", which is why I focus on the remaining differences. Differences consist, first, in the type of legal instrument the MDBs have used to adopt the guidelines. The African Development Bank has not adopted an operational policy, but a Presidential Directive concerning engagement with *de facto* governments, an instrument that is not used by the World Bank. In contrast to operational policies, Presidential Directives are issued directly by the President pursuant to Art. 37 (2) of the AfDB Agreement, exercising the power to "conduct, under the direction of the Board of Directors, the current business of the Bank". Presidential Directives are equally considered binding on the organization's staff, though they are not adopted by the Board of Directors and hence the rule-making process does not directly involve any organ representing the organization's member-states.

The decision-making criteria and process that AfDB's staff are requested to follow when approving new operations after an unconstitutional change of government largely correspond to those of the World Bank.⁸¹³ Unlike OP 7.30, however, the AfDB's Directive also establishes general principles to govern its engagement with *de facto* governments, which reflect precisely the conflicting concerns it involves. Staff should avoid a "major deterioration in the Bank Group's investments and projects", as well as – "to the extent possible" – a "major deterioration of the economic situation of the population".⁸¹⁴ In addition, they should be informed by the views and decisions of the international community. How to

⁸¹² *Supra* note 279.

⁸¹³ AfDB Presidential Directive No.03/2010 concerning Continuity of Operations and Engagement with *De facto* Governments in Regional Member Countries, issued by the President on October 20, 2010. Some smaller differences concern, for instance, the requirement for AfDB's Management to inform the Board, which is not spelled out but practiced by the World Bank under OP 7.30. Moreover, the Directive states that new operations with a *de facto* government could also be implemented by the UN or another emergency assistance agency, which would again reduce the role that the *de facto* government would play during implementation (para. 13).

⁸¹⁴ AfDB *De Facto* Governments Directive No.03/2010, para. 9.

balance these different concerns – technical considerations and fiduciary interest, the humanitarian needs of the population, and conformity with the political decisions of the international (donor?) community – is largely left to the discretion of staff.

The Asian Development Bank again has issued guidelines on dealing with *de facto* Governments in the form of a Memo of its General Counsel.⁸¹⁵ The organization has thus refrained from adopting a more formal and internally binding operational policy, declaredly because the frequency of coups in the region did not warrant so. The formulation of the guidelines itself still closely follows that of the rules adopted by the World Bank and African Development Bank.

b) Differentiation in the Planning and Implementation of Operations

The African Development Bank and the Asian Development Bank have in various official documents and statements affirmed that development cooperation with fragile states requires a differentiated approach. The AfDB's 2008 Fragile States Strategy, for instance, demands that business processes and procedures should be adapted to better take into account the different circumstances of each country.⁸¹⁶ Similarly, the ADB's Operational Plan and Staff Handbook for "working differently" in fragile states acknowledge that standard policies and approaches can be inadequate in these contexts, and hence require adaptation.⁸¹⁷ Yet to what extent have such commitments been translated into differentiated rules for planning and implementing development cooperation with fragile states?

How the AfDB and the ADB plan, manage, and implement development projects and programs is generally governed by substantive and procedural rules in their legal and policy frameworks, which also define the roles and responsibilities that recipient governments assume in the process. Similar to the World Bank, these rules are laid down in the statutes and often concretized in operational policies and procedures. Whereas the World Bank has gradually introduced a number of exceptional rules that essentially aim at reducing or simplifying the requirements for operations in fragile states, both the AfDB and the ADB have chosen a somewhat different approach.

⁸¹⁵ Memo of the General Counsel re *De Facto* Governments, dated 16 August 2000, with attached ADB Guidelines on Dealings with *De Facto* Governments.

⁸¹⁶ *Supra* note 366.

⁸¹⁷ *Supra* note 378.

As noted before, the AfDB's system of internal rules is *prima facie* less detailed and systematic than that of the World Bank. Not all of its activities are subject to an operational policy and corresponding procedures, and where they are, the respective rules are sometimes formulated in a less stringent manner. Concerning the protection of environmental and social standards in the projects it finances, for instance, the AfDB has adopted a more principles- and outcome-based approach than the World Bank, with its prescriptive and often heavily front-loaded safeguards policies.⁸¹⁸ The African Development Bank is thus generally more agile – and with more flexibility to tailor its approach to the circumstances of each country, there is also less need to systematically adapt normal policies and procedures only to engage with fragile states.

The AfDB has nonetheless found that while “consistent engagement” in all its member countries is fundamental to fulfilling its mandate, this is particularly challenging in post-conflict countries or otherwise fragile states.⁸¹⁹ The organization has therefore created a special instrument to provide technical and financial assistance to fragile states, the Fragile States Facility. As seen before, the main purpose of the FSF is to make additional financing available to fragile states, easing the effects of the performance-based allocation system. Yet the Facility also aims to enhance the effectiveness of AfDB's operations in fragile states. It was deliberately set up as an autonomous entity within the organization, so that it can operate with its own, more flexible rules and procedures than those applicable to AfDB's normal resources and operations. A corresponding Legal Note states that due to its “operationally and financially autonomous nature”, AfDB's operational policies “would not necessarily be strictly applicable” to the FSF, although they may “provide guidance”.⁸²⁰ For example, anticipating that many fragile states are unlikely to qualify for budget support, which demands strong commitment, institutional capacity, and sound governance from recipient countries, the Operations Guidelines allow some of these prerequisites to be waived for countries that are supported under the FSF.⁸²¹ This exception is quite important in practice, as staff have consequently been using the

⁸¹⁸ At the time of writing, the World Bank was in the process of reforming its safeguards system to adopt a more principles-based approach like the AfDB, the ADB, and the IFC. See *supra* note 695.

⁸¹⁹ FSF Legal Note (*supra* note 799), para. 1.1.

⁸²⁰ FSF Legal Note, para. 6.1, and para. 2.2, describing the FSF as an “operationally distinct and autonomous facility that functions outside of the framework of the Bank's Group's operations” (para. 2.2).

⁸²¹ FSF Operations Guidelines, para. 6.1.2. A negative list of all prerequisites of AfDB's regular Development Budget Support Instruments (DBSL) guidelines that cannot be waived is attached in Annex 7.

quick-disbursing instrument of budget support almost by default in fragile states. Besides, the FSF allows using more lenient procedures in order to accelerate disbursements and procurement activities for the benefit of fragile states.⁸²²

In contrast to the World Bank, which has introduced exceptional provisions for fragile states throughout different operational policies, the AfDB has thus established a more coherent, almost self-contained, differentiated regime for resource allocation, planning, and implementation in fragile states. It has done so by setting up a special-purpose entity within the organization, with a largely autonomous legal and policy framework.⁸²³ On the basis of the clearly defined eligibility criteria of the FSF, both the allocation of additional resources, and the application of differential treatment to fragile states are relatively transparent and predictable – and hence more likely to be “perceived as equitable”, as the AfDB’s Fragile States Strategy demands.⁸²⁴

That having been said, the AfDB has subsequently revised the eligibility criteria for FSF support. Acknowledging that rigid criteria can constrain AfDB’s flexibility and responsiveness when faced with extremely heterogeneous fragile states, the organization has shifted to a more qualitative, country-by-country assessment of eligibility.⁸²⁵ This echoes a point I made above with regards to the World Bank’s CPIA-based classification of fragile states: Perhaps preferential in terms of predictability and coherence, a clear-cut definition of fragile states as a trigger for differential treatment inevitably confines the organization in responding flexibly to heterogeneous and evolving situations of fragility.⁸²⁶

The Asian Development Bank, in turn, has followed neither the World Bank’s nor the African Development Bank’s approach to differentiation in planning and implementing operations in fragile states. Though it fully accords that fragile states pose specific challenges to development cooperation, so far, the ADB’ has apparently preferred to respond with a rather *ad hoc*, case-by-case approach – and if needed,

⁸²² FSF Operations Guidelines, para. 5.2.1.

⁸²³ On the legal personality of trust funds in general, see BANTEKAS, *Trust Funds under International Law. Trustee Obligations of the United Nations and International Development Banks*, 113-114, who finds that trust funds are seldom created as entities of their own rights, with a legal personality different of the overarching personality of the organization. This is only true with regards to the procedural aspects of the trust, however, whereas the law is unclear about the distinct liability of the trust or the legal regime governing its dissolution.”

⁸²⁴ AFRICAN DEVELOPMENT FUND, ‘*Strategy for Enhanced Engagement in Fragile States*’, para. 3.10.

⁸²⁵ See the Report from the African Development Fund’s 13th Replenishment, ADF-13 Report on Supporting Africa’s Transformation, at para. 4.21. The importance of the CPIA-based classification of a country as fragile in the eligibility criteria has thus been further reduced, and merely acts as one possible reference point for staff.

⁸²⁶ See *supra* chapter IV.2 b).

through waiving normal policy requirements, or using its Disaster and Emergency Assistance Policy.⁸²⁷ Under ADB's Emergency Policy, which is also applicable in the context of conflict or post-conflict countries, standard ADB policies and procedures can "be liberally interpreted to ensure speedy and effective rehabilitation".⁸²⁸ On the basis of this remarkably broad formulation, ADB's staff apparently enjoys far-reaching discretion in applying policies and procedures in the case of emergency – and what constitutes an emergency is again defined rather broadly.⁸²⁹

The ADB's approach thus contrasts with that of the AfDB with its special Fragile States Facility, and with that of the World Bank with its new OP 10.00 for project lending. Both define more precisely which of their relevant policies and procedures can be simplified, modified, or postponed, and in what situations. In practice, the ADB may no longer use uniform processes and procedures for fragile and non-fragile states alike – looking at its system of internal rules, however, this shift is so far barely reflected.⁸³⁰

We will return to a more detailed comparison and evaluation of how – and why – AfDB and ADB have adapted their legal and policy frameworks to engage with fragile state. To make the comparison more meaningful, I first examine the approach of one further organization, the European Union.

2. The European Union's Development Cooperation with Fragile States

The European Union has become one of the most important organizations providing ODA, and this is without counting the bilateral assistance provided by its member states. It is also the single largest provider of multilateral aid to fragile states, and in solely financial terms, outperforms even the World Bank.⁸³¹ At the same time,

⁸²⁷ See ASIAN DEVELOPMENT BANK, *'Achieving Development Effectiveness in Weakly Performing Countries. The Asian Development Bank's Approach to Engaging with Weakly Performing Countries'*, para. 48, whereby relaxations to business process requirements would require an approval of Management or the Board of Directors.

⁸²⁸ ADB's Bank Procedures for Disaster and Emergency Assistance (OM Section D7/ BP), paras. 16, 18, 19.

⁸²⁹ ADB's Bank Procedures for Disaster and Emergency Assistance, paras. 4 and 5 on the definition of "disaster" and "emergency".

⁸³⁰ ADB's Staff Handbook therefore explicitly states that it does not propose any changes at the level of operational policies and procedures (supra note 379). The recommendations in the Handbook rather concern the provision of policy advice, capacity-building and implementation assistance through ADB staff around the design of projects in fragile states, as well as recommendations concerning the implementation of projects in weak-capacity, high-risk environments.

⁸³¹ Supra note 346.

the EU is fundamentally different from other international organizations providing multilateral aid – from MDBs like the World Bank, the AfDB, the ADB, and also from the UN.⁸³² Comparing the European Union's development cooperation with that of the World Bank must therefore appear like comparing apples to oranges.

To begin with, the European Union is not a development organization in the sense of a technical organization that is solely or primarily mandated to promote development. It is a political organization, and has a broad mandate that covers several policy fields. This characteristic also makes the EU a unique actor in fragile states, where it has a range of instruments at its disposal to address the diverse challenges associated with fragile states, most notably, development cooperation, humanitarian assistance, and its Common Foreign and Security Policy (CFSP).⁸³³ Further, unlike other international development organizations, the EU is composed almost exclusively of countries that are themselves donors, not recipients of aid.⁸³⁴ Since many donors are former colonial powers with a particular interest in supporting their old colonies, EU development cooperation traditionally has a strong regional focus on providing aid to the African, Caribbean, and Pacific Group of States (ACP).⁸³⁵ We will see that differentiation between countries or groups of countries is a fundamental principle of EU development cooperation, and also reflected in the dualist structure of its legal framework. Finally, not only is EU development

⁸³² This is true even without considering the fact that the EU is a supranational organization. Though an important difference between the EU and the other international organizations considered here, it comes to bear less on the EU's development cooperation, which is a policy field where the EU institutions and its member states exercise their competences in parallel. See TFEU, Art. 4 IV.

⁸³³ For an overview of instruments, see EU DIRECTORATE-GENERAL FOR EXTERNAL POLICIES, European Parliament, *'EU Development Cooperation in Fragile States: Challenges and Opportunities'* (April 2013), Figure 4. While often seen as an important comparative advantage of the EU in fragile states, the range of instruments that can be used in parallel also makes coordination between them a particular challenge. On the relation between the EU's development policy and CFSP, see, for instance, FRANK HOFFMEISTER, 'Das Verhältnis zwischen Entwicklungszusammenarbeit und Gemeinsamer Außen- und Sicherheitspolitik am Beispiel des EG-Stabilitätsinstruments', in Sandra Bartelt (ed) *Entwicklungszusammenarbeit im Recht der Europäischen Union* (Nomos, 2008).

⁸³⁴ Accordingly, EU law that regulate how the organization interacts with its member states do not concern how the organization deals with recipient governments, which *prima facie* constitute third parties. See also *infra* section 2 a) of this chapter.

⁸³⁵ The group of ACP states is composed of 79 states (48 African, 16 Caribbean, and 15 Pacific states). In 2013, the European Union committed EUR 4.397 billion to ACP countries alone through the European Development Fund (EDF), whereas all other countries, including ACP countries, received commitments of EUR 9.327 billion through the EU's General Budget (ODA only). See EUROPEAN COMMISSION, *'2014 Annual Report on the European Union's Development and External Assistance Policies and Their Implementation in 2013'* (2014), pp. 19-20. The differences between EU development cooperation with ACP and non-ACP states have been somewhat reduced with the reforms of the Lisbon Treaty, which led, for instance, to the abolishment of the division of competences for planning and implementation of cooperation with ACP and non-ACP states. On the organizational structure of EU development cooperation After the Lisbon Treaty, see *infra* note 836.

cooperation generally subject to intense legal regulation, but the rules that guide the allocation, planning, and implementation of EU development assistance are usually of a more formal, legal nature than those of other international organizations.

I will further contemplate these and other differences throughout the following analysis of the EU's development cooperation with fragile states. As much as they inhibit a systematic and straightforward comparison of the EU's approach with that of the MDBs, they also make such a comparison particularly worthwhile. For the EU may face somewhat different challenges when seeking to engage with fragile states, and has different possibilities of adapting its legal framework in response. Direction and outcome of its response, however, show notable similarities.

In the following section, I briefly introduce the EU's legal framework and development mandate, indicating how some of the legal constraints the EU faces in fragile states, and the means it has for addressing them, differ from those of the MDBs (a). Next, I look in more detail at three distinctive aspects of the EU's legal framework – the political mandate, its openness towards non-state actors, and the commitment to differentiation – and examine how they shape the EU's approach to fragile states. The political mandate underlies how the EU deals with ineffective or illegitimate government counterparts (b). The EU's flexibility to engage with actors outside the central government concerns how it may bypass governments, or engage in the absence of government (c). Finally, the principle of differentiation informs how in the allocation, planning, and implementation of aid, aid instruments and procedures can be adapted to different country circumstances and needs (d).

a) Legal Framework and Mandate – Explicitly Political, Conveniently Adaptable

For development cooperation with ACP and non-ACP countries, EU primary law, the Lisbon treaty, provides a common constitutional basis that regulates fundamental principles, objectives, and competences.⁸³⁶ Beyond, the legal framework for EU

⁸³⁶ TFEU Art. 4 (4), establishing the (parallel) competence of the EU in the field of development cooperation; also Articles 208-211. The Lisbon Treaty has remodeled the organizational structure of EU development cooperation. Competences are now divided between “Development and Cooperation – EuropeAid” (a merger between the previous General Directorate for Development within the EU Commission, and the EU's implementing agency) and the European External Action Service (EEAS), which is a functionally autonomous body whose staff consists of one-third each of former employees of the Commission, of the Council and national diplomats. EuropeAid is now mainly responsible for

development cooperation is different for ACP and non-ACP countries. Cooperation with ACP countries is largely based on an international legal treaty, the Cotonou Partnership Agreement,⁸³⁷ and the rules governing disbursements under the European Development Fund (EDF), a separate EU budget.⁸³⁸ Cooperation with all other developing countries rests not on a mutually agreed treaty, but on EU secondary law, namely the Regulation of the central “Development Cooperation Instrument”, as well as four other Regulations with a more refined geographic or thematic focus.⁸³⁹ The different nature of the legal basis for cooperation with ACP and with non-ACP states – one multilateral, one unilateral – is important to bear in mind, as it partly explains why ACP states can assume a more autonomous role in development cooperation with the EU. Besides, non-binding documents like the 2005 European Consensus on Development and the Commission’s 2011 Agenda for Change provide further orientation on the objectives and principles of EU development policy and its delivery.⁸⁴⁰

These different sources constitute the legal framework and mandate of EU development cooperation. Like that of other international development organizations, the EU’s legal framework is in principle state-centric, and includes basic ideas of development, effectiveness, and sovereignty and ownership.⁸⁴¹ There are important

concrete implementation, while most of the EU’s strategic planning is done by the EEAS. On the organizational structure and legal framework of EU development cooperation in detail, see DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 170-180; and SANDRA BARTELT, ‘The Legislative Architecture of EU External Assistance and Development Cooperation’, in Sandra Bartelt (ed) *Entwicklungszusammenarbeit im Recht der Europäischen Union* (Nomos, 2008).

⁸³⁷ Cotonou Agreement (*supra* note 281). For an overview, see MARTIN HOLLAND, *The European Union and the Third World* (Palgrave, 2002), pp. 196-219.

⁸³⁸ The legal regime of the 10th EDF covering the period from 2008-2013 consists of Council Regulation (EC) No. 617/2007 (May 14, 2007) on the implementation of the 10th European Development Fund under the ACP-EC Partnership Agreement (OJ L 152/1 of June 13, 2007), and an Internal Agreement between the Representatives of the Governments of the Member States on the financing of Community aid (OJ L 247/32 of September 9, 2006). At the time of writing, the legal regime of the 11th EDF covering the period from 2014-2020 was not yet finalized.

⁸³⁹ EU Regulation No. 233/2014 establishing a financing instrument for development cooperation for the period of 2014-2020, 11 March 2014 (hereinafter DCI Regulation), superseding EC Regulation 1905/2006 of December 8, 2006, which covers the objectives and principles of cooperation, as well as processes and procedures, which are largely similar to the implementation rules of the EDF for ACP countries. Of the four other regulations, of particular interest in the context of the present study are Regulation (EU) No 235/2016 of the European Parliament and of the Council of 11 March 2014 on establishing a financing instrument for democracy and human rights worldwide (OJ L 77/85); and the IfS Regulation (*supra* note 392).

⁸⁴⁰ European Consensus on Development (*supra* note 385) and the Agenda for Change (*supra* note 390). In general, however, soft law seems to play a less important role in the legal framework for EU development cooperation, since it has such a plurality of formal legal acts at its disposal.

⁸⁴¹ On the state-centric legal framework of the EU, see *supra* chapter II.2 a), and on the basic ideas of development, effectiveness, and sovereignty, chapter III.2.

nuances, however, which also concern the EU's engagement with fragile states. First, the Treaty on the Functioning of the European Union (TFEU) commits the EU to the somewhat more narrow objective of poverty reduction.⁸⁴² Yet the objective of poverty reduction is open to interpretation, namely in light of commitments and objectives that the EU and its member states have "approved in the context of the United Nations and other competent international organizations."⁸⁴³ Since the EU has endorsed the OECD's Fragile States Principles and the New Deal, it is committed to foster state- and peace-building through development cooperation by means of reference in its primary law. More explicit provisions are contained in the Cotonou Agreement and EU secondary law. Accordingly, EU cooperation with ACP states must support the objectives of peace-building and conflict prevention, including through "strengthening the democratic legitimacy and effectiveness of governance".⁸⁴⁴ Cooperation with non-ACP states mainstreams institution-building throughout all development programs, and aims at building "legitimate, effective, and accountable public institutions" in fragile and conflict-affected states in particular.⁸⁴⁵ The EU is thus more expressly mandated to further state- and peace-building through development cooperation than the MDBs.

In stark contrast to the MDBs, EU development cooperation is also committed to fostering political principles (or: liberal-democratic values), like democracy, rule of law, and human rights.⁸⁴⁶ The political mandate does not only concern what issues the EU can or must address in development cooperation with ACP and non-ACP countries. In light of the EU's political mandate, the protection of sovereignty and ownership also receives a different pronouncement in the legal framework of EU development cooperation. At least formally, sovereignty, equality of partners, and ownership are fundamental principles of the EU's cooperation with ACP countries;

⁸⁴² Also Cotonou Agreement, Art. 1 and DCI Regulation, Art. 2 (1).

⁸⁴³ TFEU Art. 208 (2).

⁸⁴⁴ Cotonou Agreement, Art. 11 (2). See also Art. 1 (Objectives), and Art. 11 (1), which was amended in 2010 to explicitly acknowledge the interdependency between development and poverty reduction on the one hand, and peace and security on the other hand.

⁸⁴⁵ DCI Regulation, Art. 3 (3) and Annex I on the Areas of Cooperation under Geographic Programmes. On the EU's human rights conditionality, see BARTELS, *Human Rights Conditionality in the EU's International Agreements*, and on the use of democratic conditionality, MARCO GIORELLO, 'The Clauses of Democratic Conditionality in the European Union's External Relations', in Carol Cosgrove-Sacks (ed) *Europe, Diplomacy and Development* (Palgrave, 2001).

⁸⁴⁶ TFEU Art. 208 (1), referring to TEU Title V, Art. 21 (1), the principles of EU External Action. Also Cotonou Agreement, Art. 9 (1) and DCI Regulation Art. 3 (1). On the EU's political mandate, see also DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 178-179. Notably, the EBRD is a Multilateral Development Bank that was founded in 1990 and also includes political aspects in its mandate. See *supra* note 295.

somewhat less prominently, the principle of ownership is also included in the DCI Regulation.⁸⁴⁷ The recipient countries' realm of domestic affairs is, however, significantly reduced, inasmuch as the EU makes the promotion of democracy, the rule of law, and human rights explicit subjects of its cooperation.

Further, the EU recognizes national governments as the main counterparts in development cooperation, which becomes explicit in the Cotonou Agreement.⁸⁴⁸ The EU engages mostly with national governments, although unlike the MDBs, it does not require governments to assume legal responsibility for the reimbursement of loans.⁸⁴⁹ In contrast to the mandates of the MDBs, however, the EU's mandate for cooperation with ACP and non-ACP countries also formulates a principle of participation, that is of non-state actors.⁸⁵⁰ Under the Cotonou Agreement, EU cooperation with non-state actors in ACP states is usually subject to the approval of governments, which often fear that the inclusion of non-state actors in cooperation could weaken their own role.⁸⁵¹ Yet, the basic idea that actors outside of the central government play an important, complementary role both in policy-formulation and implementation – and that ownership thus extends beyond the national government – is firmly anchored. What is more, the DCI Regulation establishes that the EU shall consider using thematic programs to finance non-state actors and local authorities, including “in cases where there is no agreement on the action with the partner country concerned”.⁸⁵² At least in principle, the state-centric paradigm is thus extenuated in EU development cooperation, with its legal framework leaving more room for cooperation with local authorities and non-state actors than those of the MDBs. Perhaps not surprisingly, this is true in particular for development cooperation with

⁸⁴⁷ Cotonou Agreement, Art. 2, where “ownership” was for the first time included in a binding international legal treaty. See also Art. 4 “The ACP States shall determine the development principles, strategies and models of their economies and societies in all sovereignty.”); and DCI regulation, Art. 3 (8) lit. a).

⁸⁴⁸ Cotonou Agreement, Art. 2 and Art. 58 (2) lit (a).

⁸⁴⁹ The MDBs also need governments as legal counterparts for the conclusion of financing agreements that serve to secure the reimbursement of loans. See already *supra* note 272.

⁸⁵⁰ Cotonou Agreement, Art. 2; DCI Regulation, Art. 3 (8) lit. c); and the European Consensus on Development, recognizing participation of civil society as a common principle (para. 4 (3)). The commitment to broad participation in development cooperation was reinforced with the adoption of Council Conclusions on “The Roots of Democracy and Sustainable Development: Europe's Engagement with Civil Society in External Relations” (14535/12), 15 October 2012, Luxembourg.

⁸⁵¹ E.g. Cotonou Agreement, Art. 58 (2), according to which local authorities, private enterprises, “decentralised cooperation and other non-State actors from the ACP States” are eligible for EU financing only subject to the consent of the ACP state. The EU typically funds civil society organizations only when their activities are identified in the country's national development strategy.

⁸⁵² DCI Regulation, Art. 6 (2) lit. a); and *infra* section 2 c) of this chapter.

non-ACP states, which is governed by unilaterally-set EU secondary law, and not an agreement negotiated with recipient governments.

Further, unlike those of the MDBs, the EU's legal and policy framework refers to "differentiation" as a fundamental principle of cooperation.⁸⁵³ In general, differentiation means that a country's level of development, needs, or performance are taken into account in the allocation, as well as the planning and implementation of EU aid. An innovation of the Cotonou Agreement, the principle of differentiation reflects a growing acknowledgement of the immense diversity of developing countries, and of the gap between developing and least developed countries within the ACP group. In contrast to the MDBs, however, the EU is also less restricted in differentiating between different recipient countries. As an organization consisting exclusively of donors, recipient countries are not included within its membership. Consequently, while the EU is required to treat all its member states equally, this principle of equal treatment does not extend to the developing countries it engages with.

Against this background, the EU appears to face sometimes less, sometimes similar, and sometimes distinct challenges when engaging with fragile states on the basis of its legal framework. For instance, it has a broader mandate and a broader range of policies and instruments of assistance to pursue state- and peace-building activities in fragile states. While mandate limitations are thus not so much an issue for the EU, delimitation, coordination, and coherence between different policy fields and instruments of assistance are all the more.⁸⁵⁴ Since the present comparison is with international organizations that are only engaged in development cooperation, however, I will not address this aspect of the EU's engagement with fragile states in detail.

Of greater interest in the present context are the EU's political mandate, its openness to participation of non-state actors and accordingly less state-centric approach, and its formal commitment to differentiation. The political mandate permits the EU to openly address issues of governance, the consequences of conflict, or human rights violations. What does the political mandate imply for how the EU sees

⁸⁵³ Cotonou Agreement, Art. 2. Also DCI Regulation, Art. 3 (2); and the European Consensus on Development, paras. 56-66.

⁸⁵⁴ Particularly the delimitation between different policy fields and according competences can pose legal constraints for EU development cooperation with fragile states. See, for instance, PANOS KOUTRAKOS, 'The Nexus Between the European Union's Common Security and Defence Policy and Development', in Anthony Arnall, et al. (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Oxford University Press, 2011).

and addresses questions of government effectiveness or legitimacy in fragile states? If the EU has more means of bypassing the national government in development cooperation, is it also more flexible to engage in the absence of government? Differentiation according to different contexts and/or needs is a general principle of EU development cooperation. How does this formal commitment reflect on the planning and implementation of EU development cooperation, specifically with fragile states?

Before I turn to these questions, it must be noted that the nuances that distinguish the EU's development mandate from those of the MDBs are partly expressions of more recent shifts in mainstream development thinking – and can thus be explained by the fact that its mandate does not date back to the 1940s or 1960s.⁸⁵⁵ The Lisbon Treaty entered into force in 2009, the Cotonou Agreement was signed in 2000, and the legal regime of the EDF has an even shorter live span, with the 10th EDF covering the period from 2006-2013, and the 11th EDF that from 2014-2020. The five Regulations that inform the EU's cooperation with non-ACP states were adopted in 2006, and updated in 2014. Not only are the legal bases for EU development cooperation with ACP and non-ACP states thus more recent, they are also regularly renewed and in general easier to adapt than, for instance, the statutes of the MDBs. A case in point is the above-cited provision of the TFEU – usually static, EU primary law – whereby the objectives of EU development cooperation may evolve with the EU's commitments to new, internationally agreed objectives. In principle, the EU thus enjoys greater latitude when engaging with countries that have limited or no effective government, and has an array of formal legal instruments to implement or consolidate a differentiated approach to fragile states. To what extent it uses them will be discussed in the following sections.

b) The Political Mandate and the EU's Interactions with “Difficult Partners”

Apart from their different financing instruments, the EU's political mandate is probably what distinguishes it most from the World Bank, the AfDB, and the ADB.

⁸⁵⁵ For instance, the principles of participation and differentiation were all introduced with the 2000 Cotonou Agreement. On the changing political relations between the EU and ACP states since the 1990s and the according legal modifications introduced to their cooperation agreement, see KARIN ARTS, 'ACP-EU Relations in a New Era: The Cotonou Agreement', 40 *Common Market Law Review*, 95 (2003), and BERND MARTENCZUK, 'From Lomé to Cotonou: The ACP-EC Partnership Agreement in a Legal Perspective', 5 *European Foreign Affairs Review*, 461 (2000).

Contrary to these more technical development organizations, the EU sees development cooperation as an aspect of foreign policy, involving political decision-making and diplomacy, rather than the technical expertise of development economists alone.⁸⁵⁶

A strong, political dimension, however, was introduced into the EU-ACP cooperation only in 1995, and further elaborated in the 2000 Cotonou Agreement.⁸⁵⁷ It is thus a direct expression of the new aid orthodoxy that democracy and good governance further sustainable development, and a reflection of the changing understanding of state sovereignty post-1989 – the same paradigm shifts that have informed the growing concern with fragile states in the development community, and that of the EU in particular.⁸⁵⁸ For the EU has always defined fragile states in terms of weak governance, rather than weak capacity alone. The 2007 Council Conclusions refer to fragility as “weak or failing structures and to situations where the social contract is broken due to the State’s incapacity or unwillingness to deal with its basic functions”.⁸⁵⁹ Seen in this light, the reinforcement of the political dimension of EU development cooperation already reflects how the EU sought to deal with fragile states.

⁸⁵⁶ Also DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 339, 384, describing the EU’s law for planning and implementing development cooperation as being “diplomatically oriented”.

⁸⁵⁷ Art. 96 thus succeeds Art. 366a, introduced into the Lomé IV Convention following the 1995 mid-term review. The fact that political principles entered the Cotonou Agreement despite the ACP states’ reservations is an expression of power asymmetries in the negotiation process. During negotiations, the EU Commission offered clearer differentiation according to country circumstances and needs and “a simpler, more efficient and accessible convention” in return. See the Communication to the Council and the European Parliament: Guidelines for the Negotiation of New Cooperation agreements with the African, Caribbean and Pacific (ACP) Countries, COM (97) 537 final, 29 October. On the EU’s motivation to strengthen the legal basis for the enforcement of political principles in development cooperation, see BARTELS, *Human Rights Conditionality in the EU’s International Agreements*, 12-17; or HOLLAND, *The European Union and the Third World*, 178-182.

⁸⁵⁸ *Supra* chapter II.2 a). See also DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 178-179, arguing that the explicit commitment of EU development cooperation to the EU’s political values marks a decisive change after the Cold War, when it became increasingly accepted to limit recipients’ sovereignty by linking aid to political goals.

⁸⁵⁹ Council Conclusions on a EU response to situations of fragility (*supra* note 387), para. 2. The Conclusions further outline the basic functions of the state in terms of “rule of law, protection of human rights and fundamental freedoms, security and safety of its population, poverty reduction, service delivery, the transparent and equitable management of resources and access to power”. The preceding Commission Communication (*supra* note 387) expounds “fragility is most often triggered by governance shortcomings and failures, in form of lack of political legitimacy compounded by very limited institutional capacities” (para. 4.7). On the EU’s governance-oriented concept and response to state fragility, see also WILL HOUT, ‘Between Development and Security: the European Union, Governance and Fragile States’, 31 *Third World Quarterly*, 147 (2010), 145-147.

The mandatory commitment to fundamental principles like democracy, the rule of law, and human rights implies that the EU can, and to a certain extent must, address political issues in dealing with recipient countries. The key tools for this purpose are the Political Dialogue and as an escalation, the invocation of Art. 96 procedures under the Cotonou Agreement. Inasmuch as the EU understands state fragility in terms of weak governance, a broken social contract, or failures to provide basic services – all issues that concern principles of democracy, the rule of law, and human rights – these tools are also central components of the EU’s engagement with fragile states, or “difficult partners”.⁸⁶⁰ Moreover, the EU uses the Political Dialogue and Art. 96 to respond to disorderly transfers of power in recipient countries, e.g. after a coup d’état or conflict, and thus to situations where the legal status of a government may be in doubt.

The Political Dialogue is a continuous, formal or informal process of political consultations between the EU and the ACP states,⁸⁶¹ with the broad objective of fostering mutual understanding and facilitating agreement.⁸⁶² Most importantly, the Dialogue provides a format for addressing developments concerning the political principles that underscore the EU-ACP partnership: democracy, rule of law, human rights and good governance.⁸⁶³ These are identified as “essential elements” (good governance as “fundamental element”) of the Agreement. The Political Dialogue is also explicitly concerned with peace-building, conflict prevention policies, and as later amended, “responses to situations of fragility”.⁸⁶⁴

⁸⁶⁰ “Difficult partners” are considered countries where cooperation has been suspended, where national authorities are not committed to poverty reduction and basic political principles, and countries where the dialogue on participation of non-state actors in development is very limited. Commission Communication on the Thematic Programme “Non-State actors and local authorities in development cooperation”, COM(2006) 19 (January 25, 2006).

⁸⁶¹ Cotonou Agreement, Art. 8 (6), according to which the format of the Dialogue is very flexible, and formal or informal according to what is appropriate and required. Besides the EU and ACP states, regional organizations and civil society representatives shall be “associated” with the Dialogue based on Art. 8 (7). This has rarely been the case in practice.

⁸⁶² Cotonou Agreement, Art. 8 (2) and (3). The objective of facilitating mutual understanding concerns all aspects of the Agreement and basically any other question of common interest. See also the guidelines for the Political Dialogue established in the Resolution on the ACP-EU political dialogue (Article 8 of the Cotonou Agreement), OJ C 80/17 (1.4.2005).

⁸⁶³ Cotonou Agreement, Art. 8 (4) and Art. 9 (4). Similar commitments are included in Art. 3 (1) of the DCI Regulation, and in separate partnership and cooperation agreements concluded with non ACP-countries.

⁸⁶⁴ Cotonou Agreement, Art. 8 (5). Further, Art. 11 under the same “Political Dimension” section of the Agreement contains broad commitments to pursue policies and activities supporting peace-building, conflict prevention, and conflict resolution.

The Political Dialogue thus constitutes the EU's process of first choice to address questions of government effectiveness or legitimacy in fragile states.⁸⁶⁵ Yet the Cotonou Agreement also foresees a response to situations where political disagreements emerge between the EU and an ACP state, up to a breakdown of official relations: Article 96. If a party considers that one of the said essential elements of the Agreement has been violated, it can unilaterally initiate formal consultations to identify measures that remedy the situation.⁸⁶⁶ On the EU side, the Commission proposes when to invoke Article 96, upon which the Council decides by consensus.⁸⁶⁷ If consultations fail, are refused, or in the case of particularly flagrant violations of essential elements, the EU can take "appropriate measures". These are not further specified, except that they must be in accordance with international law, proportionate, and include suspension as a last resort.⁸⁶⁸

Notably, Article 96 is generally successive to the regular and more informal Political Dialogue that the EU holds with every ACP state under Article 8; once triggered, Article 96 consultations are still geared to reaching mutual agreement through dialogue, rather than sanctions.⁸⁶⁹ From the perspective of ACP states, however, already the initiation of formal consultations is usually considered a form of punishment: consultations have always been initiated by the EU, and led to some form of "appropriate measures".⁸⁷⁰

⁸⁶⁵ See the Communication from the Commission to the Council (*supra* note 387), para. 4.7, stating that addressing fragility demands "promoting political will for reform through dialogue and incentives, rather than through conditionality and sanction".

⁸⁶⁶ Cotonou Agreement, Art. 96 (2) lit. a), which also establishes some procedural requirements for consultations. Good governance is not an essential element, but only a "fundamental element" of the Agreement, and violations in this regard – namely cases of corruption – are dealt with under Art. 97 of the Agreement, establishing a similar procedure that has rarely been used. Specific suspension clauses are also included in partnership and cooperation agreements with non-ACP countries. The new DCI Regulation of 2014 does no longer conclude a general suspension clause.

⁸⁶⁷ There are Council Conclusions for each case under Article 96, so what countries are subject to special measures is publically available information.

⁸⁶⁸ Cotonou Agreement, Art. 96 (2) lit. c). Where the EU finds that the measures possible within the legal framework of the Cotonou Agreement are insufficient, it can unilaterally impose sanctions within the framework of the Common Foreign and Security Policy.

⁸⁶⁹ Cotonou Agreement, Art. 8 (2) and Art. 96 1a and (2) lit. a).

⁸⁷⁰ JAMES MACKIE & JULIA ZINKE, European Centre for Development Policy Management, Discussion Paper No. 64A, 'When Agreement Breaks Down, What Next? The Cotonou Agreement's Article 96 Consultation Procedure' (2005), 5. Notably, following the mid-term review of the Cotonou Agreement in 2005, the EU and the ACP states agreed to "strive to promote equality in the level of representation", and "committed to transparent interaction prior to, during, and after the formal consultations". Perhaps more importantly, the ACP group as a whole can since assume a role in the consultations, so that individual ACP states are not alone in negotiating with the EU. See Annex VII of the Cotonou Agreement.

Both in deciding when to trigger Article 96 (i.e. when and by what standards human rights, the rule of law, or the principle of democracy have been violated), and in deciding on the use of sanctions if formal consultations fail, the EU holds considerable discretion – which it uses in practice.⁸⁷¹ In some cases, the Commission deliberately abstains from invoking Article 96 in response to violations, for instance when it expects consultations or sanctions to have no impact on the violating state. In essence, Article 96 constitutes a flexible, diplomatic tool: it allows the EU to enforce its general, political conditionality in development cooperation, but only if it sees a chance of inducing positive change.⁸⁷² Consistent decision-making, though perhaps expected, is thus not a priority for the EU.

Not least the fact that in about half the cases, Art. 96 was invoked in response to a coup d'état, suggests a brief comparison with the World Bank's Operational Policy 7.30 on Dealing with De Facto Governments. Unlike OP 7.30, Art. 96 procedures can be used for addressing questions of ineffective or illegitimate government, independent of whether they directly affect the economic feasibility and success of concrete development projects or programs. The EU can and does openly address the essentially political nature of such questions, through an openly political process. Since its financial assistance usually does not come in the form of loans, potential fiduciary risks of engaging with *de facto* governments are less important. For the World Bank with its non-political mandate, the purpose of OP 7.30 lays precisely in insulating an operational decision concerning the identification of government counterparts that are able to assume financial liability for the repayment of loans, from the political influence of its member states – which the Policy does more or less successfully.⁸⁷³

Article 96 and the Bank's OP 7.30 have in common that they leave a certain latitude to decision-makers, that is the EU Commission and Council and the World

⁸⁷¹ Article 96 procedures were used mostly in response to alleged violations of democratic principles (often coup d'états) and human rights, for instance, in Zimbabwe and Sudan, Cote d'Ivoire and Liberia, Guinea and Togo, and outside of Africa, Haiti and the Fiji Islands. See Evaluation Services of the EU, *Evaluation of Co-ordination and Coherence in the Application of Article 96 of the Cotonou Partnership Agreement*, 2007; and with an overview and discussion of cases between 1996 and 2004, see ANDREW BRADLEY, European Centre for Development Policy Management, Discussion Paper No. 64D, '*An ACP Perspective and Overview of Article 96 Cases*' (August 2005).

⁸⁷² The case of Zimbabwe, for instance, is often cited as a negative example. In Zimbabwe, the EU invoked Art. 96 in 2002, but its measures have remained without impact and only negatively affected EU-Africa relations prior to the 2002 elections. On the factors that are seen to contribute to successful consultations, see MACKIE & ZINKE, '*When Agreement Breaks Down, What Next? The Cotonou Agreement's Article 96 Consultation Procedure*', 8.

⁸⁷³ For a detailed analysis and evaluation of OP 7.30 see *supra* chapter IV.3 b) and c).

Bank's staff respectively. Neither foresees a procedure that allows for an open discussion of different considerations and objectives in deciding on how to engage with a *de facto* government. In both cases, the organization is not obliged to furnish reasons for its decision, which thus remain largely non-transparent.⁸⁷⁴ Arguably, inasmuch as the EU's Article 96 and the World Bank's OP 7.30 serve different purposes, the organizations use their discretion differently. The EU uses the available discretion to allow political considerations to decide how it will respond to an unconstitutional change of government, or deteriorating standards of governance more generally. OP 7.30, in contrast, aims to ensure that staff decisions on such delicate political matters are guided by mostly technical considerations. The discretion build into OP 7.30 thus rather reflects the Bank's preference for flexible and decentralized decision-making on operational matters.

Finally, both organizations could use their discretion to carefully consider the circumstances of each case and thus avoid an automatic suspension of aid, e.g. after a military coup or in situations of deteriorating governance more generally. After all, both organizations have committed to the OECD's Fragile States Principle to "stay engaged" even in difficult situations, where disengagement may be neither adequate in light of the humanitarian needs of the population, nor conducive to longer-term objectives of development cooperation.⁸⁷⁵ For instance, if the EU seeks to gradually raise standards of good governance also in fragile states, it cannot automatically disengage wherever its standard of good governance is not yet or no longer met.⁸⁷⁶ At the same time, the EU and the World Bank could use the accorded discretion for political considerations – with the possible result being that the relative economic or political importance of a country may ultimately decide whether the EU's political conditionality are enforced, or Bank operations discontinued.⁸⁷⁷ The lack of

⁸⁷⁴ Further latitude consists in the fact that World Bank staff can practically invoke OP 7.30 without making a final decision on the continuation of operations for indefinite times. Somewhat similarly, the EU is not required to establish the duration of "appropriate measures" ahead, to provide an exit plan, or to resume consultations before measures are prolonged.

⁸⁷⁵ Fragile States Principles, para. 9 (*supra* note 144).

⁸⁷⁶ See Commission Communication on "Governance in Developing Countries", COM(2003) 615 final, 20 October 2003, p. 20; and Commission Communication on "Governance in the Consensus on Development", COM(2006) 421 final, 30 August 2006, p. 9. On the EU's approach to governance in fragile states, see also KUON, *Good Governance im Europäischen Entwicklungsrecht*, 236-246, who finds that while the EU's normative standard of good governance is essentially maintained, instruments and means of implementation must be modified in the context of fragile states.

⁸⁷⁷ Arguably, this is often the case at the World Bank (*supra* chapter IV.3 c)), and also at the EU. See HOLLAND, *The European Union and the Third World*, 133.

transparency and often consistency in the decision-making of both organizations does not serve to dispel this suspicion.

c) Engagement in the Absence of (Good) Government and with Non-State Actors

How does the EU deal with situations where there is no government in power, temporarily or for prolonged periods of time? To address this question, we first need to look to the EU's involvement in Somalia, where the organizations found ways to overcome constraints of its legal framework that it subsequently formalized and mainstreamed. As an ACP state, Somalia had been receiving EU aid under the Lomé Conventions I-III, but with the breakdown of government, was no longer able to ratify the Lomé IV Convention in 1989, the predecessor of the Cotonou Agreement.⁸⁷⁸ While the EU assumed an important role in providing and coordinating humanitarian aid to Somalia from 1991, given the absence of a legal basis and government counterpart, it could not provide development funds. Therefore, the EU and the government representatives from all ACP states adopted conclusions that authorized the exceptional release of unspent funds reserved for Somalia under the preceding Lomé Conventions.⁸⁷⁹ In the absence of a national government, the role of National Authorizing Officer, usually a senior government official appointed by and representing the ACP state in all EU-financed operations, was to be replaced by the EU's Commissioner for External Relations, for as long as the circumstances justified.⁸⁸⁰

When Somalia had still no government to sign the Cotonou Agreement in 2000, the EU and the ACP countries this time agreed on a formal provision whereby countries that were parties to the previous Conventions but unable to sign and ratify “in the absence of normally established government institutions” may receive aid

⁸⁷⁸ For a detailed reconstruction and analysis of the EU's engagement in Somalia, including its lead role in representing the international community and establishing a Somalia Aid Coordination Body (SACB), see EMMA VISMAN, European Center for Development Policy Management, ECDPM Working Paper Number 66, *'Cooperation with Politically Fragile Countries: Lessons from EU Support to Somalia'* (1997).

⁸⁷⁹ Conclusions adopted on December 4, 1992; and *ibid.*

⁸⁸⁰ On the role of the National Authorising Officer, see Cotonou Agreement, Art. 35. Further, during the 1995 mid-term amendment of Lomé IV, a provision was added to enable Somalia to accede the Convention as soon as it had formed a government – and in that case, to postpone the application of certain rights and obligations under the Convention in the interest of Somalia. See Agreement Amending the Fourth ACP-EC Convention of Lomé, November 1995, Art. 364a.

subject to the approval of the ACP-EU Council of Ministers.⁸⁸¹ Further, “provisions will be made for those countries which, due to exceptional circumstances, cannot access normal programmable resources.”⁸⁸² Initially, the Council of Ministers therefore adopted Conclusions that permitted an EU official to be entrusted with the competence usually accorded to the National Authorizing Officer – and to act on behalf of the Somali people.⁸⁸³ This practice was codified in a 2005 amendment to the Agreement, and is no applicable in all situations where an ACP state has insufficient capacity due to a crisis caused by “war, other conflict, or “exceptional circumstances with a comparable effect” – that is, situations that fall short of a complete breakdown of government like in Somalia.⁸⁸⁴ Normal implementation arrangements shall be resumed as soon as the responsible national authorities are again able to manage development resources.

Like the World Bank, the EU has thus not only sought an *ad hoc* response to dealing with the absence of government, but has partly formalized and mainstreamed its response by amending the Cotonou Agreement.⁸⁸⁵ The approach of the World Bank and the EU is also similar, in that broadly speaking, both organizations respond to the ineffectiveness of national governments by allowing for the temporary substitution of government approval and/or implementation. Beyond this common denominator, however, not only are there obvious differences concerning the applicability, content, and consequences of the relevant provisions. It is also important to note that the Banks response is codified in internal rules, OP 2.30 and OP 10.00, which are elaborated by the Bank’s Management and approved by the Executive Board. In contrast, the provisions in the Cotonou Agreement were included in a multilateral treaty following negotiations between the EU and the ACP States, and a formal amendment procedure. The EU’s rules were thus not unilaterally set, but

⁸⁸¹ Cotonou Agreement, Art. 93 (6).

⁸⁸² Cotonou Agreement, Annex IV (Implementation and Management Procedures), Art. 3 (3). Notably, this arrangement was not only used in the absence of a central government in Somalia, however, but also in Sudan, where the EU was unwilling to engage with the government for political reasons; SOPHIE GOMES, et al., European Center for Development Policy Management ECDPM Discussion Paper No. 31, ‘*The EU’s Response to Conflict Affected Countries Operational Guidance for the Implementation of the Cotonou Agreement*’ (2001).

⁸⁸³ ACP-EC Council of Ministers Decision No 3/2001 on the allocation of resources to Somalia from the 8th and 9th European Development Fund, OJ L 56, 27.2.2002, p. 23. Strategic planning and detailed programming of development projects in Somalia was within the responsibility of the European Commission’s Somalia Operations Unit and the Directorate-General Development.

⁸⁸⁴ Cotonou Agreement, Annex IV, Art. 3 (5).

⁸⁸⁵ The World Bank has adopted OP 2.30 to enable engagement in the absence of a government, at the request of the international community, and OP 10.00 to permit the use of alternative implementation arrangements in weak-capacity environments. See *supra* chapter IV.3 a) and 4 a).

at least formally, are based on the consent of those states to which substituting arrangements could eventually apply.

Besides the exceptional arrangements included in the Cotonou Agreement, it is important to note that the EU is generally more flexible when it comes to engaging in a country despite the absence of government – or the absence of ‘good’ government. First, the EU can always use humanitarian assistance, an alternative channel for rendering assistance to populations in need without going through the government.⁸⁸⁶ Under the Cotonou Agreement, humanitarian assistance can be provided at the request of the affected ACP state, or alternatively, of the Commission, an international organization, or even an international or local NGO.⁸⁸⁷ Though humanitarian assistance is usually also provided with the consent of the affected state, a formal request from the government in power is hence not required. Not least for this reason, the EU understands humanitarian assistance also as an instrument of last resort in fragile states: to continue rendering assistance in situations that are deemed inadequate for the more state-centric and cooperative modes of development assistance.

Yet the EU’s legal framework for development cooperation, too, leaves room for providing assistance to local authorities and non-state actors directly. These are further avenues of providing development assistance where institutions of the central government are not functioning, and explicitly recognized as such by the EU in its approach to fragile states. The EU sees cooperation with non-state actors as alternatives to ensure continued engagement in a country “for reasons of solidarity with populations, of long term aid effectiveness and of global security” – which captures very well the humanitarian, operational, and political motivations that regularly shape the international community’s concern with fragile states.⁸⁸⁸

Financing of non-state actors under the Cotonou Agreement is still subject to the agreement of the ACP state, and there is no explicit exception for situations where

⁸⁸⁶ On the differences between development and humanitarian aid concerning the role of the state, see VON ENGELHARDT, 'Reflections on the Role of the State in the Legal Regimes of International Aid'; or PAUL HARVEY, Overseas Development Institute, HPG Report 29, '*Towards Good Humanitarian Government. The Role of the Affected State in Disaster Response*' (September 2009), 21-24.

⁸⁸⁷ Cotonou Agreement, Art. 72 (6)

⁸⁸⁸ Communication from the Commission to the Council, Towards an EU Response to Situations of Fragility (*supra* note 387), at 4.2.

there is no government to render approval.⁸⁸⁹ More flexibility exists under the DCI Regulation concerning Thematic Programmes, though they receive only a relatively small share of the EU's budget.⁸⁹⁰ The EU uses Thematic Programmes, specifically the one for non-state actors and local authorities, to finance activities precisely where there is no agreement with the government – or for that matter, no government to agree with.⁸⁹¹ In addition, the EU's Instrument on Democracy and Human Rights (EIDHR) is specifically designed for rendering direct support to civil society organizations, parliaments, and even individuals.⁸⁹² Established by means of a separate Regulation, the thematic instrument shall be used precisely in difficult situations where there is no agreement with the government on the promotion of democratic values and human rights, or no official cooperation with the government. It is another preferred instruments of the EU for engaging with fragile states.

Finally, even if the EU has thus a legal basis and specific financial instruments for supporting local authorities and non-state actors instead of engaging with the government directly, EU development cooperation remains very much focused on central government actors.⁸⁹³ This is owed to the fact, first, that in order to engage with actors outside of the government – be it as participants in planning and implementation processes, or as direct recipients of grants – external actors have to have a sound knowledge of local circumstances and dynamics, and decide whom to support or not to support without fuelling conflict or societal tensions. In Somalia, for instance, the EU sought to extend its cooperation with national and local non-state actors, but faced difficulties in identifying counterparts with the necessary capability

⁸⁸⁹ Cotonou Agreement, Art. 58 (2). Arguably, the above-cited provision in Annex IV of the Cotonou Agreement, Art. 3 (4) could be referred to in order to circumvent the requirement of approval in such situations.

⁸⁹⁰ Though laid out in the DCI Regulation, Thematic Programmes are cross-cutting and can also be used in cooperation with ACP countries. They are subsidiary to the EU's Geographic Programmes. See SANDRA BARTELT, 'The Institutional Interplay Regarding the New Architecture for the EC's External Assistance', 14 *European Law Journal*, 655 (2008), 672.

⁸⁹¹ DCI Regulation, Art. 6 (2) lit. a) and Annex II B. See also the Commission Communication on the Thematic Programme "Non-State actors and local authorities in development cooperation" (*supra* note 860), elaborating the particular suitability of the Programme in "difficult partnerships", post-conflict or fragile states.

⁸⁹² See EU Regulation No. 235/2014 on establishing a financing instrument for democracy and human rights worldwide (*supra* note 839) and EU Regulation No. 236/2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action (March 22, 2014), Art. 11 on eligibility. The EIDHR is managed by the European Commission and its delegations in the field.

⁸⁹³ See, for instance, HOUT, 'Between Development and Security: the European Union, Governance and Fragile States', 154-55, criticizing the EU's focus on government actors and formal institutions in the context of development cooperation with fragile states.

and some degree of broader representativeness or legitimacy.⁸⁹⁴ Second, even where counterparts are identified, the EU's procedures for engaging with non-state actors are still particularly complex, posing further obstacles. And third, the gap between the EU's formal commitment and operational practice is owed to an established institutional culture of dealing with formal government institutions – a culture very similar to that of the MDBs.⁸⁹⁵

d) Differentiation and Special Treatment in Aid Allocation, Planning and Implementation

The EU has a comprehensive set of non-binding policy documents acknowledging that fragile states constitute particularly challenging environments for development cooperation.⁸⁹⁶ These documents form part of the policy framework that provides the analytical and conceptual grounds for the EU's engagement with fragile states, but do not take the form of binding EU secondary law. Moreover, they primarily formulate specific strategies and objectives – strengthening democratic governance, institutional capacities, and state-society relations – instead of proposing different processes for development cooperation with fragile states.⁸⁹⁷

If the EU thus appears more concerned with doing different things, than doing things differently in fragile states, this is for two reasons. First, the EU's legal regime for project lending and budget assistance is generally less prescriptive and demanding on recipients' institutions than those of the MDBs, where internal rules that regulate the provision of ODA have posed obstacles to engaging in weak-capacity, high-risk environments.⁸⁹⁸ Concerning project lending, the EU's legal framework establishes

⁸⁹⁴ On the challenges of engaging particularly with local non-state actors in Somalia, see VISMAN, 'Cooperation with Politically Fragile Countries: Lessons from EU Support to Somalia'. Despite these challenges, the case of Somalia still illustrates the EU's capacity to support the provision of basic services through non-state actors, as well as to reach out to actors outside of the government and promote partnerships between government and civil society at the local level.

⁸⁹⁵ See the external evaluation commissioned by the EU Commission, Evaluation of EC Aid Delivery Through Civil Society Organizations" (December 2008), identifying major gaps between the EU's commitments towards civil society participation and actual implementation practices. Also FERNANDA FARIA & ANDREW SHERRIFF, European Centre for Development Policy Management, 'EU Policies to Address Fragility in Sub-Saharan Africa. European Report on Development Background Paper' (2009), 8.

⁸⁹⁶ See *supra* chapter II.3 b).

⁸⁹⁷ Some of the recommendations of the 2007 Council Conclusions (*supra* note 387), however, also concern processes and instruments of cooperation with fragile states, which shall be made "more flexible and capable to provide quick responses" (paras. 12-13).

⁸⁹⁸ For instance, the World Bank's regime for project lending is particularly front-loading in terms of requirements that concern the institutions and policies of potential recipient countries, requirements

less demanding *ex ante* requirements for the approval of projects.⁸⁹⁹ Concerning budget assistance, the EU also maintains relative discretion in deciding when and on what grounds to provide direct support to a country's budget, and there is no minimum threshold of preconditions that potential recipients must meet.⁹⁰⁰ Certainly, we have seen that the EU makes considerable use of conditionalities that come to bear during implementation – including political conditionalities, which demand that recipient government's respect democratic principles, the rule of law, and human rights.⁹⁰¹ Yet, we have also seen that the EU does not automatically sanction violations, i.e. enforce its political conditionalities legalistically.⁹⁰²

Second, the EU is less concerned with doing things differently in fragile states, because differentiation already constitutes a fundamental principle of EU development cooperation. In principle, the legal framework thus appears more attuned to different levels of capacity, or for that matter, variations in empirical statehood. How does the EU's formal commitment to differentiation inform the allocation, planning and implementation of aid in fragile states?

The principle of differentiation resounds in a number of provisions throughout the legal framework for development cooperation with ACP as well as non-ACP countries. Both at the level of resource allocation and in project planning and implementation, the EU must ensure that its approaches and aid instruments are tailored to a country's specific circumstances or needs.⁹⁰³ Next to this general commitment, the principle of differentiation applies in particular to Least-Developed

that have proven unrealistic and inadequate for engaging with fragile states. In detail, see *supra* chapter IV.4 a).

⁸⁹⁹ This is true both for the Cotonou Agreement and the Regulations that govern EU assistance to non-ACP states. For a comprehensive analysis of the EU's legal regimes for project lending and budget assistance, including a comparison with those of the World Bank, see DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 383-397. Though not in the form of a binding legal instrument, the EU Commission has begun to develop a set of guidelines for staff, which concern the use of its different aid instruments. See, for instance, the Commission's Guidelines No 2 on Support to Sector Programmes (July 2007), or No 3 on Making Technical Cooperation More Effective (March 2009).

⁹⁰⁰ See the EU Commission's Budget Support Guidelines, Executive Guide (September 2012), wherein eligibility criteria for budget assistance broadly refer to the "relevance" and "credibility" of a proposed government strategy.

⁹⁰¹ On the EU's "constitutional conditionalities" in detail, see DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 391-394.

⁹⁰² See *supra* section 2 b) of this chapter, where I elaborate how the EU makes use of the discretion accorded under Art. 96 of the Cotonou Agreement.

⁹⁰³ On the meaning and scope of differentiation in EU development cooperation, see also ECDPM, European Centre for Development Policy Management, Discussion Paper No.134, 'Differentiation in ACP-EU Cooperation. Implications of the EU's Agenda for Change for the 11th EDF and Beyond' (October 2012).

Countries and other vulnerable groups, where it provides the basis for special and differential treatment. For instance, the allocation of EU resources for cooperation with ACP and non-ACP countries takes place on the basis of performance as well as different needs, and particular attention shall be paid to the difficulties of conflict-affected states.⁹⁰⁴ Similarly, the Cotonou Agreement and DCI Regulation call for differentiation in the design of strategies, projects, and programs in general, and require special treatment specifically for LDCs, as well as special consideration of the needs of post-conflict countries.⁹⁰⁵

Apart from differentiation according to local context, a number of provisions in the EU's legal framework also permit flexibility in adapting to changing circumstances over time. Again, flexibility concerns the allocation of resources to unforeseen needs, the review of projects and programs in line with changing circumstances or needs, as well as adjustments in the implementation phase.⁹⁰⁶ Since the adoption of the new DCI Regulation in 2014, such measures concerning the extraordinary allocation of resources and flexibility in programming are available for all countries "in crisis, post-crisis, or situations of fragility".⁹⁰⁷

The Cotonou Agreement and the DCI Regulation thus contain a number of provisions that differentiate in favor of weak-capacity states, and which may (sometimes explicitly) benefit fragile and conflict-affected states. The EU does not only associate fragile states with weak capacity, however, but also with situations of actual or imminent crisis. Therefore, the EU has created specific instruments to more effectively prevent or respond to crisis in developing countries, most notably, the Instrument for Stability and Peace (IfSP, previously Instrument for Stability, IfS).⁹⁰⁸

⁹⁰⁴ Cotonou Agreement, Annex IV, Art. 3 (1) and DCI Regulation, Art. 3 (2).

⁹⁰⁵ A similar pattern can be found, for instance, in the principles for development finance cooperation under the Cotonou Agreement. Art. 56 (1) lit. b) contains, first, a general commitment to flexibility and adaptability for all ACP states, Art. 56 (2) requires, second, special treatment specifically for LDCs, and third, acknowledges and differentiates with regards to the specific needs of post-conflict countries. In addition, see the general provisions on special treatment of LDCs in Art. 84 (1) and (2), with a list of LDCs contained in Annex VI of the Agreement).

⁹⁰⁶ For instance, Art. 12 (2) of the DCI Regulation, or the Common Implementing Regulation (EU) No 236/2014 of 11 March 2014, laying down common rules and procedures for the implementation of the Union's instruments for financing external action, concerning the adoption of special measures by the Commission in the event of "unforeseen and duly justified needs" (Art. 2 (1)).

⁹⁰⁷ E.g. DCI Regulation, Art. 3 (2), whereby "countries most in need", including in particular countries in fragile situations, "shall be given priority in the resource allocation process"; and Art. 12, establishing special provisions for programming in countries or regions in crisis, post-crisis, or situations of fragility.

⁹⁰⁸ Regulation No. 230/2014 establishing an Instrument contributing to Stability and Peace (March 11, 2014), OJ L77/1, hereinafter IfSP Regulation. Other instruments established in this context are the African Peace Facility, whereby development funds of the EDF are used to support African-led

Established in 2006 and renewed in 2014, the IfSP caters to the EU's concern with the security risks associated with fragile states, and many of the activities that it can finance lay clearly at the interface between foreign, security, and development policy.⁹⁰⁹ With its cross-cutting objectives and flexible design, the IfSP seeks to overcome constraints of the EU's conventional instruments, which are less suitable for a rapid, flexible, and sustained engagement in countries experiencing crisis. IN fact, the IfSP mainly serves to channel rapid aid to (re)establish the conditions deemed necessary for the implementation of the EU's normal development cooperation in crisis-affected countries.⁹¹⁰ Notably, this includes situations where cooperation has been suspended under Article 96, following a violation of the "essential elements" – democracy, rule of law, or human rights. To address its broad objectives, the IfSP offers considerable flexibility regarding what type of measures can be supported, and the recipients of aid, which can be national governments as well as community-level institutions, international organizations, and non-state actors.⁹¹¹ Besides, the IfSP is subject to a simplified decision-making process and lighter programming requirements to enable a more rapid use.⁹¹²

Finally, a number of more recent reforms outlined in the Commission's 2011 Agenda for Change, and (pending the adoption of a legal basis for the 11th EDF) in the Commission's programming instructions for 2014-2020 explicitly target fragile states.⁹¹³ Before, the terms "fragile states" and "situations of fragility" appeared in EU secondary law and the amended Cotonou Agreement of 2010, but never played a role in guiding the planning and implementation of EU development cooperation.⁹¹⁴ The

peacekeeping operations on the African continent, and also other, predominantly capacity-building initiatives in the pre- and post-conflict phases.

⁹⁰⁹ Accordingly, the use of the IfSP has raised questions as to the delineation and coherence of the EU's development policy and the CFSP. See *supra* note 833.

⁹¹⁰ IfSP Regulation, Art. 1 (4) lit. a) and b) and Art. 3 (1) specify the objectives and types of support in response to situations of crisis, emerging crisis, or to prevent crisis. It is thus complementary to the EU's other financial instruments, and applicable where other instruments cannot be used within the necessary timeframe. In addition, the IfSP can also be used in countries with stable conditions, in order to foster the capacity of the EU and its partners in conflict prevention, peace-building (Art. 4), and to provide assistance in addressing "global and trans-regional threats and emerging threats" (Art. 5).

⁹¹¹ IfSP Regulation, Art. 1 (2) and Art. 6, 7, 8.

⁹¹² IfSP Regulation, Art. 7.

⁹¹³ Agenda for Change (*supra* note 390); and the Instructions for the Programming of the 11th European Development Fund (EDF) and the Development Cooperation Instrument (DCI) – 2014-2020 (Brussels, May 15, 2013), prepared by the EEAS and EuropeAid. Both documents highlight that EU support in the future will focus on those countries most in need, including fragile states, and therefore increase the flexibility and context-specific differentiation of aid levels, instruments, and modalities.

⁹¹⁴ The fragile states terminology appears in the DCI Regulation and since its last amendment in 2010, also in the Cotonou Agreement (Art. 11 as part of the Political Dimension). Previously, ACP states

EU's budget support instrument that was revised in this context, for example, introduces a specific category of budget support for fragile states, which is targeted at state-building, or more precisely, at supporting "transition processes towards development and democratic governance".⁹¹⁵ So-called "State Building Contracts" do not require an assessment of the government's track record in terms of human rights, democracy, and rule of law, which implies that political standards that are required to access direct budget support are practically lowered for fragile states. Instead, potential risks that the EU identifies shall be balanced against the risk of inaction, e.g. concerning the provision of vital basic services – a shift in thinking that we now from the World Bank.⁹¹⁶ However, this is not to say that a country's commitment to human rights or democracy no longer matter in the EU's choice of aid instrument. For example, the Commission's Agenda for Change recommends that if countries "loosen" their commitment to such standards, the EU should gear up its cooperation with non-state actors and local authorities.⁹¹⁷

In sum, the EU's legal framework for development cooperation establishes differentiation – the commitment to take into account the different starting point of each country – as a general principle, which neither that of the World Bank, the AfDB, or ADB do. As an abstract principle, what differentiation entails needs to be concretized through more specific rules concerning the allocation, planning, and implementation of aid. Similar to the MDBs, the EU has accordingly introduced a number of provisions that differentiate based on a country's capacity or needs. Differentiated treatment is mostly accorded to LDCs and other vulnerable groups, though increasingly also to countries affected by conflict, crises, or "situations of fragility". What material and procedural standards can be modified, however, under what conditions, and how, is not always clear. Arguably, this corresponds to the finding that the legal and policy framework that regulates planning and implementation of EU operations is generally more flexible and accommodating to

have rejected the use of the terminology. Unlike the World Bank, the AfDB, and the ADB, however, the EU does not have a formal definition or classification of fragile states. On the EU's understanding of state fragility outlined in the 2007 Council Conclusions, see *supra* note 859.

⁹¹⁵ See the Communication (October 2011) and corresponding Council Conclusions (May 2012) on "The Future Approach to EU Budget Support to Third Countries", which is reflected in the Commission's Budget Support Guidelines (*supra* note 900), p. 10. State Building Contracts are used, for example, in Côte d'Ivoire, Mali Haiti, Sierra Leone, and Togo.

⁹¹⁶ On the World Bank's approach to risk-management particularly in fragile states, see *supra* chapter IV.4 d).

⁹¹⁷ Agenda for Change (*supra* note 390), p. 5.

political considerations than those of the MDBs. Whether and how a government's structure or performance affect how the EU differentiates between different recipient countries thus appears to remain a political decision – perhaps not surprisingly for a political organization.

3. Comparison and Conclusion

This chapter provided a short, comparative analysis of how, and to what effect the AfDB, the ADB, and the EU have adapted their legal and policy frameworks to engage in development cooperation with fragile states. My objective was twofold: first, to present a more comprehensive picture of adjustments and regulatory trends concerning fragile states in the law of development cooperation. Second, to use the emerging nuances to learn more about the factors that may influence whether and how an organization decides to adapt its legal and policy framework, and hence formalize a differentiated approach.

The African and the Asian Development Bank have *prima facie* much in common with the World Bank. Not only do they operate with the same classification and accordingly understanding of fragile states. Inasmuch as they have similar objectives and engage in the same types of activities, they also face similar constraints when seeking engagement with fragile states, where governments have often limited effectiveness. There is hence reason to suspect that the AfDB and the ADB have also emulated the World Bank's response.

This is indeed the case with regards to the MDBs' dealings with *de facto* governments. After all, how to engage with an entity that came to power by unconstitutional means is an area of common concern to development banks, which need clarity particularly regarding a government's capacity and will to fulfill its financial obligations. The question arises so frequently that all organizations have felt the need to provide guidance to staff, though with varying degrees of bindingness. In contrast, how to engage in the absence of a government in power is a question that has obviously come up much less often. Neither the AfDB, nor the ADB have therefore formulated a general policy principle concerning their involvement in the absence of a government in power, as the World Bank did in OP 2.30. Nonetheless, though normally bound to operate with and through governments, both organizations have created avenues through which they can provide limited support to the population of a

country without necessarily involving the government – the AfDB with its Fragile States Facility, and the ADB through emergency assistance. Especially where the organizations’ regular resources are not involved, both are thus more flexible and also prepared to work around the government – though if not from a government, the ADB insists on the approval of an “internationally legitimate governing authority”.⁹¹⁸

Like the World Bank, the AfDB and the ADB have also a practice of reducing or postponing requirements to enable a more flexible and speedy response in countries with low capacity and urgent needs. How they do so, however, differs. With its Fragile States Facility, the AfDB has created a quasi self-contained, differentiated regime that governs the use of resources for operations in fragile states. In contrast, the ADB has largely refrained from introducing specific exceptions for fragile or conflict-affected states in its legal and policy framework, and instead preferred to respond *ad hoc*, if necessary by waiving requirements. In sum, the “gravitational force” and model role of the World Bank, the oldest and largest of the MDBs, is apparently not so potent when it comes to developing and formalizing an approach to engaging with fragile states.⁹¹⁹

The EU is an organization essentially different from the MDBs, and also operates with a different mandate and aid instruments when providing ODA to fragile states. Besides the fact that it is not a development bank that provides loans, the most notable distinction is that the EU has a political mandate, and development cooperation constitutes one of several instruments of the EU’s external relations – in other words, a diplomatic tool. Two additional distinctions in its legal framework proved to be relevant in the context of EU engagement in fragile states: the principle of participation (and hence the commitment to a notion of ownership that extends beyond the executive), and the principle of differentiation.

Still, the EU assumes “the presence of a functioning government as a legitimate interlocutor and partner” in development cooperation no less than the MDBs, and has faced challenges in the context of fragile states.⁹²⁰ A number of exceptional provisions were therefore included in the Cotonou Agreement, to allow allocating resources and conducting operations in countries with no government in power.

⁹¹⁸ *Supra* note 810.

⁹¹⁹ BOISSON DE CHAZOURNES, 'Partnerships, Emulation, and Coordination: Toward the Emergence of a Droit Commun in the Field of Development Finance', 175.

⁹²⁰ FARIA & SHERRIFF, 'EU Policies to Address Fragility in Sub-Saharan Africa. European Report on Development Background Paper', 11.

Notably, these provisions were not introduced through the adoption of an internal rule like those of the World Bank in OP 2.30, but through negotiation and subsequent amendment of the Cotonou Agreement – and hence with the consent of those potentially affected.

In turn, the EU's approach to situations that concern not the absence of a government, but rather the identification of a legitimate government counterpart in post-conflict countries or following a coup d'état, is markedly different from that of the MDBs. These are situations that quite simply do not pose a challenge to the EU, since what makes them so tricky for the MDBs – their undeniably political nature – makes them palatable for a political organization. Instead of adopting guidelines to instruct staff in steering the difficult course between admissible and inadmissible political considerations, the EU can call a spade a spade – and leave it to political decision-making how to choose and interact with different government counterparts. What is more, if it does not want to interact with a government for political reasons, the EU has still the mandate and instruments to deliver aid to non-state actors or local authorities directly, and is hence less attuned to dealing only with (effective) governments than the MDBs.

When it comes to modifying substantive or procedural requirements falling on recipient states to account for capacity constraints, the EU's approach proved to be at once more comprehensive and less specific. Differentiation constitutes a fundamental principle for development cooperation, with constant reminders throughout its legal framework to take into consideration the special circumstances and needs of each country, including those in “situations of fragility”. Beyond this broad commitment, however, precisely what standards can be lowered or postponed, for whom and under what conditions, is not always clear. With regards to fragile states, the EU's emphasis has rather been on simplifying procedures to be able to respond more rapidly to situations of crises.

On the basis of this more nuanced picture of the regulatory activity of different organizations, what do we learn about the factors that influence whether and how organizations adapt their legal and policy framework to engage with fragile states? Obviously, to what extent international development organizations modify rules to engage with fragile states depends first of all on the extent to which rules are deemed too constraining or inadequate to begin with. It is thus not surprising that we found the greatest differences between the EU and the MDBs. The EU has a political

mandate, whereas the MDBs have a political prohibition clause in their statutes, which probably poses the most constraints in dealing with fragile states, for better or for worse. Besides, standards of effectiveness, which are partly responsible for the high *ex ante* requirements on ODA recipients in the internal rules of the MDBs, are somewhat less paramount in the EU's legal framework, and hence do not stand in the way of assisting countries with weak capacity.

Yet the analysis of the AfDB and the ADB has also brought to light notable differences in their respective approach, although their legal frameworks and mandates are largely similar to that of the World Bank. We have seen differences emerge mostly regarding the extent to which the three MDBs have decided to adopt or modify rules of the legal framework – or instead preferred a less regulated, less formalized response. After all, it is not mandate questions alone that account for an organization's approach to fragile states, and what role rule-making assumes therein. Other factors are at least as important, even if they are more difficult to grasp, at least in a legal study: an organization's institutional culture, for instance, its particular conception of state fragility, or the interests of influential member states.

In this light, the fact that the ADB has largely abstained from making substantial modifications to its legal framework can be attributed to the fact that there are fewer fragile states in the region.⁹²¹ It is also owed, however, to an institutional culture that is particularly responsive to the sensitivities of treating “fragile states” differently. This becomes clear considering that the ADB has continuously reiterated that the classification of a country as fragile does not in any way impair its membership status within the organization, but constitutes an acknowledgement of the country's special needs.⁹²²

The AfDB, in turn, covers the region that includes by far the most fragile states. Still, it has not been as active as the World Bank in adopting or modifying internal rules. One reason is that the AfDB quite simply has a general preference for flexibility

⁹²¹ Sub-national conflicts are, however, widespread in the region, and considered to lead to regionally confined situations of fragility. See the influential study of the Asia Foundation, THOMAS PARKS, et al., *The Asia Foundation, 'The Contested Corners of Asia - Subnational Conflict and International Development Assistance'* (2013).

⁹²² E.g. ASIAN DEVELOPMENT BANK, *'Working Differently in Fragile and Conflict-affected Situations - The ADB Experience: A Staff Handbook'*, para. 22. On the ADB's institutional culture, see also J. Jokinen, *Balancing between East and West. The Asian Development Bank's Policy on Good Governance*, in: MORTEN BOAS & DESMOND MCNEILL (eds), *Global Institutions and Development. Framing the World?* (Routledge, 2004), pp. 137-150. The authors show how the ADB's approach to good governance was influenced by its specific political and institutional environment, and the importance given to its apolitical mandate in particular.

and experimental, case-by-case approaches over strict regulation, as suggested by the fact that it has still no Operational Manual like the other MDBs. Arguably, the role of lawyers within the institution is not the same as the role that lawyers have come to assume in the World Bank.

Further, a fundamental difference between the EU and the MDBs consists not just in their legal mandates, but also in the fact that the former is not a bank that needs to worry about its creditor rating or the financial liabilities of its clients. Its institutional culture is hence less risk-averse, which is also reflected in how the EU engages with fragile states.⁹²³ Besides, the EU also seems to have a somewhat different conception of state fragility than the MDBs. At least in policy documents, the EU has emphasized poor governance and weak state legitimacy as key characteristics of state fragility from early on.⁹²⁴ In contrast, the World Bank's conception of state fragility at least in the beginning focused on weak state capacity, and its approach accordingly on differentiated requirements and implementation assistance.

Further, it should not be underestimated what role an organization's membership structure can play in shaping its approach to fragile states. Differentiating more between individual recipient states, for instance, is unlikely to meet with objections in an organization consisting only of donors like the EU. In contrast, development organizations with a more mixed membership structure like the World Bank will always have to respond to the concern that differentiation in favor of one country automatically entails disadvantages for others.

Finally, the comparison between the World Bank and the often similar-minded AfDB and ADB, which have gone less far in their reform efforts concerning fragile states, draws attention to a last, important factor. The World Bank's most powerful shareholders have shown a strong interest in seeing the organization engage more with conflict-affected and fragile states, and therefore overcome constraints posed by its legal framework and mandate.⁹²⁵ That the World Bank has overcome such constraints has much to do with the dominant position of these shareholders in the

⁹²³ The culture of risk-aversion is so dominant at the World Bank and other MDBs that it hardly matters that fragile states most often receive funding from the IDA, which does not invest on global financial markets itself, or from other sources such as trust funds.

⁹²⁴ At the same time, the EU maintains a strong focus on security aspects in development cooperation with fragile states. See WILL HOUT, 'EU Statebuilding Through Good Governance', in David Chandler & Timothy Sisk (eds), *Routledge Handbook on International Statebuilding* (Routledge, 2013).

⁹²⁵ For instance, the USA, the most important shareholder of the World Bank, pushed for the organization to engage in the West Bank & Gaza and in Bosnia. See *supra* chapter IV.3 a).

Executive Board, the organ that has the power to interpret the Articles of Agreement, and to approve new internal rules and operations.⁹²⁶

⁹²⁶ In contrast, the AfDB has “a large and dispersed ownership with no single member or group playing a pivotal role”, which can also be said for the ADB. ENGLISH & MULE, *The African Development Bank*, pp. 1, 39-48. This is not to say that politics do not matter within the AfDB – for instance, Mingst argues that the AfDB is as much a political institution as the World Bank. KAREN A. MINGST, *Politics and the African Development Bank* (University Press of Kentucky, 1990), pp. 151-186.

VI. Dealing with Fragile States, Adapting to State Fragility – Of Emerging Patterns and the Potentials and Perils of Regulation

When engaging in development cooperation with fragile states, international organizations come across a problem that to some extent concerns the functioning and effectiveness of the international legal order as a whole. International organizations operate on the basis of rules that presume the existence of an effective government, in a *de jure*, and in a *de facto* sense. In fragile states, a formal government may, however, be nonexistent, or lack the capacity to fulfill its most basic rights and obligations. In previous chapters, we have seen how various development organizations have therefore adapted their premises, and the rules on which they operate. We have looked at the rules that govern how the World Bank, the AfDB, the ADB, and the EU negotiate, plan, and implement development projects – and considered how, and to what effect they have been modified to support the increasing engagement with a large variety of fragile states.

Having demonstrated that though fragile states are a phenomenon beyond law, the evolving response of international development organizations is not, we are left with two questions. First, what are the broader patterns that emerge from the rule-making activities of various international development organizations? Certainly, there are important variations concerning the extent and specifics of how different organizations change their legal and policy frameworks to deal with fragile states. Regarding both the processes of adaptation and the specific results, we have, however, also seen notable similarities, which can serve as a basis for identifying patterns. These emerging patterns – though not very systematic and only partly formalized – illustrate how different development organizations have sought to respond to the refutation of the ‘effective government’ premise, which traditionally underscores their legal and policy frameworks.

The second question that remains to be addressed is of interest to legal scholars and development practitioners alike. What are the potentials and perils of using rules to instruct and formalize a differentiated approach to dealing with fragile states? There appears to be demand within international development organizations for more appropriate rules, which have the potential to provide guidance, and also the basis for

a more transparent and consistent manner of aiding fragile states.⁹²⁷ Yet, the notion of fragile states is analytically imprecise and comes with a dubious political agenda.⁹²⁸ Moreover, international legal scholars must look with caution at any endeavor to regulate and formalize a differentiated approach to dealing with fragile states, and eventually, to cement a *de facto* second-class status of statehood. At the same time, legal scholars are well placed to scrutinize the processes whereby international development organizations make or modify rules, and set – often unilaterally – the terms and conditions upon which fragile states receive ODA.

In addressing the two questions, this final chapter synthesizes and discusses the key findings of the preceding analysis of the World Bank, the AfDB, the ADB, and the EU. I begin by tracing patterns in the way international development organizations are dealing with fragile states, and accommodating state fragility, illustrating how ‘state-building’ emerges as a new development paradigm – and what is more, a regulatory theme (VI.1). On this basis, I identify the potentials and perils of endeavors to regulate a differentiated approach to fragile states, be it through adopting or modifying rules that govern the transfer of ODA (VI.2). To conclude, I draw on legal approaches to governance activities of international organizations to propose some design considerations and procedural requirements that could enhance the potential of a legal response (VI.3).

1. Emerging Patterns – State-building as a Development Paradigm and Regulatory Theme

International organizations have increasingly found that dealing with fragile states, basic premises of the traditional, state-centric development paradigm are put into question. In response, development organizations have reinforced efforts at establishing, reforming, or strengthening state institutions – in other words, on creating or fostering those conditions in recipient states found necessary for aid to be effective. With ‘effective government’ turning from a precondition into an objective or outcome of development cooperation, state-building, in the sense of strengthening

⁹²⁷ See, for instance, the report prepared by World Bank staff: The World Bank, Operationalizing the WDR 2011 (*supra* note 359), Annex B: Matrix for Action, demanding the revision of OPs/BPs; or ASIAN DEVELOPMENT BANK, ‘*Working Differently in Fragile and Conflict-affected Situations - The ADB Experience: A Staff Handbook*’, 1; and in detail, *supra* chapter II.3.

⁹²⁸ On the analytical shortcomings of the notion of fragile states, see *supra* chapter I.1, and on the questionable political agenda behind it, also I.2 b).

effective government, is gaining importance as a paradigm for development cooperation.

State-building was proclaimed a central objective in the OECD's Fragile States Principles and in the New Deal, to which all major international development organizations operating in fragile states adhere.⁹²⁹ The objective of establishing, reforming, or strengthening state institutions also reverberates throughout the organizations' strategies and policies for fragile and conflict-affected states. It is an objective that is *prima facie* in line with the mandate of international development organizations. After all, functioning state institutions and state-society relations are increasingly understood as preconditions for sustainable and equitable economic development.⁹³⁰ Considering that state-building is an ill-defined, but holistic undertaking and regularly involves cross-sectoral approaches, however, not all activities that contribute to state-building are also compatible with the mandate of development organizations. Drawing the line between quintessential development objectives and broader political objectives of state-building in fragile states has perhaps become increasingly difficult in abstract, but not altogether meaningless in practice. After all, not just the legal boundaries, but also the comparative advantage of development organizations in highly politicized, domestic processes of state-building remains contentious, and a clear indication of what the state-building agenda includes or excludes is often missing.⁹³¹

While state-building is firstly a paradigm that describes the high-level objectives and priorities of development cooperation specifically with fragile states, in a way, it can also be seen as a regulatory theme. For acknowledging that an effective government counterpart cannot always be taken for granted has led international development organizations not just to refocus their activities on the objective of

⁹²⁹ Fragile States Principles (*supra* note 144), Principle 3, and the New Deal (*supra* note 338). There is an extensive literature on the concept and practice of state-building. For a selection, see the references provided in *supra* note 125.

⁹³⁰ This shift is reflected in various trends in mainstream development thinking, which I outline in *supra* chapter II.1 a).

⁹³¹ The complex challenges that international development organizations face when seeking to engage in 'state-building' have been aptly described by the Independent Evaluation Group when assessing the World Bank's LICUS initiative in 2006 (*supra* note 777). The questions raised by the IEG remain equally relevant (and unanswered) today. See also TODD MOSS, et al., 'An Aid-Institutions Paradox? A Review Essay on Aid Dependency and State Building in Sub-Saharan Africa' *Center for Global Development Working Paper 74* (January 2006), highlighting the potentially negative effects of aid dependence on state institutions; or ACEMOGLU & ROBINSON, *Why Nations Fail. The Origins of Power, Prosperity, and Poverty*, criticizing the "ignorance hypothesis" with which development agencies approach local actors, assuming they do not know what good institutions should look like; and on for a critical assessment of the state-building in general, see the references in *supra* note 128.

strengthening state institutions. To some extent, it has also led international organizations to revisit rules that were designed for more stable, high-capacity countries – and that, broadly speaking, assume the existence of an effective government.

As a regulatory theme, state-building describes the underlying motive of how development organizations modify their legal and policy frameworks to engage with fragile states. Behind the move to differentiated approaches for fragile states lays essentially an endeavor to adapt rules to the present capacity constraints of state institutions, while making sure that their capacity is strengthened in the long term. The objective of strengthening the capacity of states to fulfill certain functions – as well as the acknowledgement that achieving this objective may require trade-offs in the short term – form the core of the state-building concept and agenda.⁹³² Already the term *state-building* suggests that certain premises first need to be established for the state to be able to take on the full range of rights and responsibilities – in this case, in the development process.

Understanding state-building as a regulatory theme provides a framework for analyzing the patterns that emerge in the way international development organizations adapt their legal and policy frameworks. A first pattern consists in the move towards greater differentiation in the rules that govern the transfer of ODA to countries with different capacities. We have seen that the rules that normally govern the approval and implementation of development projects and programs can, if strictly enforced, significantly delay, disrupt, or prevent engagement with countries that presently lack the capacity to comply.⁹³³ Alternatively, they are ignored and hence remain ineffective. Therefore, many organizations have sought to better tailor the substantive and procedural requirements they attach, mostly unilaterally, to the approval and implementation of development assistance to the different capacity of recipient countries.

Differentiation can be achieved through various techniques. Certainly, the easiest way is to differentiate at the level of conditionalities that are negotiated individually with each country in connection with development projects or programs, and which

⁹³² ZAUM, *The Sovereignty Paradox: The Norms and Politics of International State-Building*, 4-5.

⁹³³ In *supra* chapter IV.4, for instance, I elaborate in detail how the internal rules that regulate the World Bank's lending operations pose *ex ante* and *ex post* requirements on recipient countries. The requirements are generally aimed at ensuring that the projects and programs financed with ODA achieve development objectives, conform to certain fiduciary, environmental and social standards, and meet standards of economy and efficiency.

are not established as abstract, general rules in the law of development organizations. In fact, most organizations have committed to better tailor conditionality to the capacity of different countries.⁹³⁴ Another technique that does not require adapting existing rules is the establishment of specific financial instruments or trust funds, which are subject to different rules concerning project approval and implementation, and thus facilitate engagement in fragile states.⁹³⁵ Further, we have seen that the ADB relaxes substantive and procedural requirements for fragile states by waiving general policy requirements or making extensive use of its emergency policy.⁹³⁶

Yet international development organizations have also introduced differentiated obligations at the level of those abstract, general rules of their legal and policy frameworks that *prima facie* apply equally to all countries. For example, the EU has made differentiation a general principle in the Cotonou Agreement and DCI Regulation.⁹³⁷ The World Bank has reduced or postponed certain fiduciary, environmental and social standards for countries facing capacity constraints through revising the legal framework for project lending, OP 10.00.⁹³⁸ Moreover, the World Bank, the AfDB, and the EU have adopted exceptional provisions and mechanisms that enable the use of budget assistance in countries with institutions and policies that do not meet the usual, pre-approval requirements in terms of good governance.⁹³⁹

⁹³⁴ See, for instance, the World Bank's Good Practice THE WORLD BANK, '*Good Practice Note for Development Policy Lending. Development Policy Operations and Program Conditionality in Fragile States*'; or THE WORLD BANK & AFRICAN DEVELOPMENT BANK, '*Providing Budget Aid in Situations of Fragility: A World Bank - African Development Bank Common Approach Paper*', at 10, stating that "There is broad consensus among the three institutions that core conditionality in fragile states should be limited in number" (the three institutions being the World Bank, the AfDB, and the EU), and „should be results-oriented, focused on the most critical elements and realistic.“ To what extent international development organizations have actually been using more or less stringent obligations in their contractual agreements with fragile states, however, is a different question that goes beyond the scope of the present study. It would require analyzing and comparing a large number of different kinds of financing agreements and project-level contracts concluded with fragile and non-fragile countries.

⁹³⁵ See *supra* chapter V.1 b) on the AfDB's Fragile States Facility; *supra* chapter II.3 b) on the World Bank's State- and Peacebuilding Fund; and *supra* chapter IV.3 a) and c) on the World Bank's use of country-specific or thematic trust funds, e.g. in the West Bank and Gaza, Kosovo, and Somalia.

⁹³⁶ *Supra* chapter V.1 b). Most international development organizations have emergency policies that once triggered, permit reducing or postponing certain (mostly procedural) requirements to respond swiftly to onset disaster or emergencies. The World Bank also used to apply its emergency policy in fragile states beyond situations of immediate emergency, but has since formalized and mainstreamed the according exemptions for all operations in countries facing capacity constraints in OP 10.00.

⁹³⁷ See *supra* chapter V.2 d), where I also show how this general principle is further concretized in a number of provisions that provide a basis for differential treatment.

⁹³⁸ *Supra* chapter IV.4 a).

⁹³⁹ See *supra* chapter IV.4 b) on the World Bank's exceptional provision of budget assistance to fragile states; chapter V.1 b) on the option of waiving requirements for budget support under the AfDB's FSF, and chapter V.2 d) on the EU's use of budget assistance without assessing a government's track record in terms of democracy, rule of law, and human rights, in order support state-building in fragile states.

Notably, where *ex ante* requirements have been reduced to acknowledge that the capacities necessary for compliance first need to be established, or that standards need to be achieved progressively, development organizations usually put more emphasis on supervision and other *ex post* controls that come to bear during the implementation stages.⁹⁴⁰

Next to differentiating at the level of substantive and procedural requirements for the approval of development projects or programs, international organizations also differentiate at the level of implementation, for instance, by providing targeted capacity-building and implementation support. Again, the World Bank's revised OP 10.00 requires the use of alternative implementation arrangements in weak-capacity countries to be accompanied by capacity-building measures.⁹⁴¹ Strengthening the institutional capability of recipient countries has always been a centerpiece of development cooperation, and the idea of "capacity development" has experienced a resurgence of interest over the last decades – not only, but also in fragile states.⁹⁴² In this context, however, capacity-building is targeted precisely at strengthening the state's capacities in areas where they are insufficient to achieve the usual *ex ante* requirements for aid.⁹⁴³ In this sense, certain *ex ante* requirements of development organizations are no longer criteria for exclusion, but become benchmarks for identifying areas where capacity-building is required during implementation.⁹⁴⁴

As indicated before, how international development organizations tailor rules to the weak capacity of fragile states or differentiate at the level of implementation is

⁹⁴⁰ This is the case, for instance, for budget assistance to fragile states provided by the World Bank, the AfDB, and the EU. See THE WORLD BANK, 'Good Practice Note for Development Policy Lending. Development Policy Operations and Program Conditionality in Fragile States', paras. 47-50; and THE WORLD BANK & AFRICAN DEVELOPMENT BANK, 'Providing Budget Aid in Situations of Fragility: A World Bank - African Development Bank Common Approach Paper', 11.

⁹⁴¹ *Supra* chapter IV.4 a).

⁹⁴² For a broad overview, see OECD, 'The Challenge of Capacity Development. Working Towards Good Practice' (2006). Notably, what capacity-building means or entails – for instance, whose capacity, what capacities are built – is often ill-defined. See, for instance, BRIAN LEVY & SAHR KPUNDEH (eds), *Building State Capacity in Africa. New Approaches, Emerging Lessons* (World Bank Institute, 2004); or OPERATIONS EVALUATION DEPARTMENT, The World Bank, 'Capacity Building in Africa: An OED Evaluation of World Bank Support.' (April 2005)

⁹⁴³ For instance, World Bank operations in fragile states often include a capacity-building component, mostly with a focus on public expenditure management, procurement, civil service, or revenue collection reforms. See INDEPENDENT EVALUATION GROUP, 'World Bank Assistance to Low-Income Fragile- and Conflict Affected States', table 4.1 (p. 37).

⁹⁴⁴ Though not specifically with regards to fragile states, this approach underscores the World Bank's Program-for-Results Financing instrument introduced in 2012. Government programs are assessed against (a condensed version of) the World Bank's safeguards, but where shortcomings are identified, they do not automatically lead to the exclusion from financing. Rather, they are addressed during the implementation stages, with the Bank providing support through capacity-building. In detail, see *supra* chapter IV.4 c).

reminiscent of a familiar concept in international law: differential treatment.⁹⁴⁵ Most commonly known in international environmental and international trade law, the concept of differential treatment refers to the use of differentiated standards to accommodate empirical differences between states in the design or implementation of rules.⁹⁴⁶ Differential treatment rests on the acknowledgment that strict legal equality can actually cause inequality, given that states have very different levels of capacities, including factual capacities, to exercise rights and obligations. At the same time, differential treatment – be it through lowering standards, focusing on progressive realization, or providing implementation support – can also contribute to increasing the effectiveness of rules where implementation is currently weak.⁹⁴⁷ Arguably, both are also motives for international development organizations in adapting their legal and policy frameworks vis-à-vis fragile states.

These examples of differentiation are, however, still too rudimentary and sporadic to amount to a coherent regime of differential treatment of fragile states. They also illustrate that differential treatment in the law of development cooperation does not necessarily target and hence apply exclusively to “fragile states”, as a distinct group of countries with common characteristics or needs. Quite in contrast, definitions or classifications specifically of fragile states or situations assume a relatively minor role as a trigger for differentiation, as I pointed out repeatedly throughout this thesis. More often, differentiated *ex ante* requirements or implementation targets post-conflict countries (e.g. the World Bank), countries affected by emergencies (ADB), or still more generally, by crisis (EU).⁹⁴⁸

⁹⁴⁵ *Supra* chapter IV.4 a).

⁹⁴⁶ For a comprehensive treatment of the concept and forms of differential treatment in international law, see PHILIPPE CULLET, 'Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations', 10 *European Journal of International Law*, 549 (1999); and CULLET, *Differential Treatment in International Environmental Law*. In his monograph, Cullet defines differential treatment as “intrinsically linked to the search for substantive equality” (p. 19), as situations where the principle of reciprocity of obligations gives way to differentiated commitments, for the purpose of fostering substantively more equal results than what is achieved through the principle of formal equality, in situations where actors are not equal” (p. 1). On differential treatment in general, see also CHRISTOPHER D. STONE, 'Common but Differentiated Responsibilities in International Law', 98 *American Journal of International Law*, 276 (2004); on forms of differential treatment in environmental law, see also LAVANYA RAJAMANI, *Differential Treatment in International Environmental Law* (Oxford University Press, 2006); and in international trade law, JESSEN, *WTO-Recht und "Entwicklungsländer"*.

⁹⁴⁷ CULLET, *Differential Treatment in International Environmental Law*, 16.

⁹⁴⁸ Moreover, the EU has made differentiation a general principle, which *prima facie* does not gear towards a particular group of countries or situations at all. However, more concrete, differential provisions in the EU's legal framework for development cooperation often target LDCs, to which the majority of fragile states belong. See *supra* note 598.

On the one hand, the fact that none of the organizations I analyzed attaches particular importance to the classification of fragile states as a trigger for differential treatment reflects that the notion is generally considered too broad and reductionist to be of operational value.⁹⁴⁹ Most organizations prefer an approach that is tailored to specific situations or circumstances, and hence more fine-tuned, not to mention politically correct. On the other hand, the limited role of the fragile states classification indicates that many of the changes that development organizations have made to their legal and policy frameworks are perhaps inspired by, or addressed to challenges associated primarily with fragile states – but they are also very much linked to broader trends in the law of development cooperation, which are not limited to fragile states.

One such broader trend that also constitutes a pattern in how development organizations adapt their legal and policy frameworks for fragile states is the move towards greater flexibility in regulating the transfer of ODA. Flexibility is increasingly valued as essential in steering processes of development cooperation in immensely different countries and circumstances. Importantly, it is not the antithesis of regulation. Flexibility rather refers to the possibility of adapting rules not only in line with a country's capacity, but also, for instance, changing circumstances over time. In that sense, flexibility is an objective that can be achieved through the specific design of regulation. Further, though flexibility can still result in differentiation, it is *prima facie* not aimed at differentiation. To the contrary, flexibility (for all) may eventually replace differentiation (for a few) in the law of development cooperation.⁹⁵⁰ What I observe, however, is that international organizations deem rules that provide for flexibility in the sense of adaptability to be particularly suitable for regulating development cooperation in the context of political volatility and quickly evolving needs, and thus in fragile states.

The techniques for inducing flexibility into substantive and procedural rules vary, and to what extent they involve modifying the existing legal and policy framework naturally depends on how much flexibility it leaves in the first place. For example, we have seen that the EU's legal framework is less rigid when it comes to pre-approval

⁹⁴⁹ On this point, see also *supra* chapter IV.2 b).

⁹⁵⁰ With regard to differential treatment in the field of environmental law where it is most common, Rajamani already makes out a trend whereby more flexible rules for all countries are increasingly preferred over differentiated obligations for specific groups of countries. LAVANYA RAJAMANI, 'The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law', 88 *International Affairs*, 605 (2012).

requirements. Still, the organization has introduced various provisions that facilitate the adjustment of ongoing projects and programs in response to “crisis, post-crisis, or situations of fragility”, and the allocation of resources to unforeseen needs.⁹⁵¹ Flexibility is also a guiding principle in regulating the World Bank’s new exceptional allocation regime for countries facing “turnaround-situations”.⁹⁵² Eligibility and actual amounts of additional financing can thus be adapted in line with changing circumstances and needs. The AfDB, too, has reformed the eligibility criteria of the Fragile States Facility to allow for more flexibility in addressing extremely heterogeneous and evolving situations of fragility.⁹⁵³

At the World Bank, the move towards greater flexibility in the regulation of development cooperation also surfaces in the growing debate about the advantages of principles-based over strictly rules-based approaches.⁹⁵⁴ This debate shows that flexibility goes beyond specific provisions that establish in what regard, and to what extent normal processes and procedures can be deviated from. Flexibility can also be built into the form of regulation, e.g. detailed and precise rules versus broad principles that leave room for discretion. For instance, while the Bank’s project lending is traditionally quite strictly regulated and contains a number of requirements for recipients to meet, the Program-for-Results financing instrument created in 2012 deliberately focuses on a less prescriptive and more condensed version of social and environmental standards.⁹⁵⁵ The AfDB and ADB have already reformed the entire system of safeguard policies, moving to a principles-based approach that can more easily be adapted to the different constraints and capacity-building needs of each country.⁹⁵⁶ Further, the ADB’s Emergency Policy broadly establishes that standard policies and procedures should “be liberally interpreted to ensure speedy and effective rehabilitation”.⁹⁵⁷ In this case, flexibility stems from a guideline concerning the (liberal) interpretation of rules, rather than from the formulation of the rules.

⁹⁵¹ *Supra* chapter V.2 d).

⁹⁵² On the World Bank’s regime for allocating additional resources to countries facing “turn-around” situations, see *supra* chapter IV.2 b).

⁹⁵³ *Supra* chapter V.1 b).

⁹⁵⁴ See LEROY, 'The Bank's Engagement in the Criminal Justice Sector and the Role of Lawyers in the "Solutions Bank": An Essay'; and *supra* chapter IV.1 b).

⁹⁵⁵ *Supra* chapter IV.4 c).

⁹⁵⁶ In detail, see DANN & VON BERNSTORFF, '*Reforming the World Bank's Safeguards. A Comparative Legal Analysis*', pp. 17-24 on the use of a “principled and outcome-based approach”, together with a greater use of country systems and capacity support.

⁹⁵⁷ *Supra* note 828. See also ASIAN DEVELOPMENT BANK, '*Operational Plan for Enhancing ADB's Effectiveness in Fragile and Conflict-Affected Situations*', para. 18, on the importance of flexibility in

These patterns of differentiation and flexibility concern mostly the adaptation strategies of international development organizations (e.g. lowering, postponing, or waiving certain requirements) for fragile states that have insufficient capacity to fulfill them. But states with very weak or no effective government may equally lack the capacity to assume rights and responsibilities in the development process. We have seen that international development organization usually require national governments to have the capacity to express consent, to sign international agreements, and further to assume a decisive role in planning and implementing development projects and programs.⁹⁵⁸ Rules that protect the sovereignty, and more specifically, ownership of recipient countries are contained in the legal and policy frameworks of all development organizations.⁹⁵⁹ Formally, they apply to all countries equally. Are there patterns in how development organizations have sought to engage with countries deemed incapable of exercising sovereign rights or assuming ownership?

At the general policy-level, the OECD Fragile States Principles, the New Deal, and the fragile states strategies of various organizations reiterate that national ownership is essential for supporting development in fragile states.⁹⁶⁰ If anything, it appears even more important that governments not only buy in, but take the lead in decision-making where development cooperation concerns intrinsically political processes of state formation. From a more operational perspective, too, working through state institutions is considered crucial if the objective is to enhance the state's capacity to provide basic services, and eventually its legitimacy in the eyes of the population.⁹⁶¹

There appears to be a certain shift in thinking about ownership in fragile states, however, a shift that is to some extent reflected in the legal and policy frameworks of

project processing and implementation in fragile states.

⁹⁵⁸ See *supra* chapter II.2 a) on the state-centric paradigm of development cooperation and its premises.

⁹⁵⁹ See *supra* chapter III.2, elaborating how the principle of sovereignty is reflected in the law of international development organizations.

⁹⁶⁰ See the Fragile States Principles (*supra* note 144) and the New Deal (*supra* note 338), promoting “country-led and country-owned” development. Also: AFRICAN DEVELOPMENT BANK, 'Addressing Fragility and Building Resilience in Africa: The African Development Bank Group Strategy 2014–2019', para. 3.6; or ASIAN DEVELOPMENT BANK, 'Achieving Development Effectiveness in Weakly Performing Countries. The Asian Development Bank's Approach to Engaging with Weakly Performing Countries', para. 61.

⁹⁶¹ The relationship between a state's performance in providing basic services to the population and its legitimacy is, however, not necessarily linear. See CLAIRE MCLOUGHLIN, 'When Does Service Delivery Improve the Legitimacy of a Fragile or Conflict-Affected State?', Forthcoming in *Governance* (2014).

development organizations.⁹⁶² It might be too much to speak of a pattern, but there are several examples where we have seen development organizations temporarily substitute or bypass national governments that lack the minimum capacity required to exercise certain rights, or assume full ownership of the development process.

For instance, international development organizations have sought to deliver aid directly to, or through non-state actors instead of the government in fragile states, and have been prepared to circumvent applicable restrictions if needed.⁹⁶³ The AfDB, can through the Fragile States Facility channel resources directly to non-state actors without any government involvement required, an option that is not available for regular resources and aid instruments.⁹⁶⁴ AfDB's Fragile States Strategy recommends support to non-sovereigns for situations where effective government has broken down, but also where there is no legitimate or consenting government counterpart.⁹⁶⁵ The World Bank has modified OP 10.00 to allow projects to be implemented through international organizations, national entities other than the government, or the Bank where the government's capacity is insufficient.⁹⁶⁶ Notably, such alternative arrangements must be limited in time, and accompanied with capacity-building measures so as to allow the transfer of responsibilities to the government as soon as possible. Permitting to bypass the state in the short-term, while safeguarding national ownership in the long-term, OP 10.00 thus exemplifies how the objective of state-building becomes a regulatory theme.⁹⁶⁷ The EU, in turn, is generally committed to

⁹⁶² On the modified understanding of ownership in fragile states, see, for instance, ASIAN DEVELOPMENT BANK, *'Achieving Development Effectiveness in Weakly Performing Countries. The Asian Development Bank's Approach to Engaging with Weakly Performing Countries'*, paras. 31, 34, and 41, expressing the idea that fragile states may lack the necessary capacity to assume full ownership, and that achieving government ownership in the longer term may require working more closely with sub-sovereign entities, NGOs, or the private sector in the short term. Also EUROPEAN COMMISSION & EUROPEAN UNIVERSITY INSTITUTE, *'European Report on Development. Overcoming Fragility in Africa. Forging a New European Approach'*, 4.

⁹⁶³ Notably, though sought as a substitution strategy in the context of fragile states, enhancing the participation of actors outside of the government in processes of development cooperation is generally not a new trend, nor one confined to contexts where governments are exceptionally weak or nonexistent. See, for instance, DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 107-108, describing how demands for broader participation of the affected and other non-state parties in the development process already emerged in the 1970s.

⁹⁶⁴ *Supra* chapter V.1 a).

⁹⁶⁵ AFRICAN DEVELOPMENT FUND, *'Strategy for Enhanced Engagement in Fragile States'*, 2.

⁹⁶⁶ *Supra* chapter IV.4 a). Besides, the World Bank's SPF can be used to channel special resources directly to non-state actors, and in principle without involving the government. However, activities financed through the SPF with no government involvement are usually of a small scale only, and often pertain to analytical work. See *supra* note 766.

⁹⁶⁷ In general, the World Bank remains attuned to dealing with states through their governments, and understands the political prohibition clause to circumscribe the limits of dealing with non-state actors.

(broad) participation in its legal framework, and has a number of aid instruments to provide direct support to non state-actors.⁹⁶⁸ Whereas such support generally complements the EU's engagement with national governments, the organization has also established a financial instrument precisely to render assistance to non-state actors and local authorities where there is no effective government – or no government it agrees with.⁹⁶⁹

Arguably, development cooperation thus come closer to the *modi operandi* of humanitarian assistance, which is mostly implemented through international organizations and NGOs, often in by-passing state institutions and delivering aid to the population directly.⁹⁷⁰ At least in the long run, such implementation strategies may undermine the overall objective of state-building, by strengthening non-state actors at the expense of the central government.

Development organizations have not only looked for alternative ways to channel resources and implement projects in fragile states. Perhaps more interesting from an international law perspective, they have also sought alternative ways to authorize their engagement. The World Bank's Operational Policy 2.30 is certainly the most striking, though not necessarily representative example. The internal rule formulates how the Bank can engage in the absence of a government capable of expressing consent, namely, by relying on a request of the international community.⁹⁷¹ We have found similar provisions in the Emergency Policies of the ADB and the AfDB, however, whereby emergency assistance can be provided upon request of an internationally legitimate authority (ADB), or a UN appeal (AfDB).⁹⁷² The Cotonou Agreement between the EU and ACP states, in turn, allows the transfer of aid to countries with no

The Bank's cautious approach is outlined in the Guidance Note on Multi-Stakeholder Engagement (*supra* note 275).

⁹⁶⁸ See *supra* chapter V.2 a) on the principle of participation in the EU's legal framework for development cooperation; and *supra* chapter V.2 c) on the EU's Thematic Programme on "Non-State actors and local authorities in development cooperation" and other instruments for providing support to non-state actors, e.g. humanitarian assistance.

⁹⁶⁹ For the EU with its political mandate, it is thus not always a government's capacity, but also its perceived legitimacy or political will to cooperate that determine to what extent the EU will turn to non-state actors instead. See, for instance, the Commission's Agenda for Change (*supra* note 390), establishing that non-sovereign support should be scaled up where national governments do not adhere to the EU's political standards.

⁹⁷⁰ I unfold this argument in VON ENGELHARDT, 'Reflections on the Role of the State in the Legal Regimes of International Aid'.

⁹⁷¹ In detail, see *supra* chapter IV.3 a). In the absence of a formal government in power, the World Bank has also entered into legal agreements with entities other than the government, e.g. UNTAET in East Timor and UNMIK in Kosovo.

⁹⁷² *Supra* chapter V.1 a).

effective government, and hence no government official able to act as National Authorizing Officer and approve and manage resources allocated.⁹⁷³ Arguably, the respective provisions reflect the spirit of the emerging legal concept of the responsibility to protect, or for that matter, the responsibility to rebuild.⁹⁷⁴ To provide assistance to a population in need where the government is unable to do so, organizations like the World Bank and the EU are prepared to dispense with the requirement of state consent.⁹⁷⁵

The protection of sovereignty and ownership may have always been more of an ideal than a practiced reality in the interaction of donor organizations with recipient states.⁹⁷⁶ The described arrangements, however, are established in the legal frameworks of development organizations – in more or less formalized, internal rules, and in the case of the Cotonou Agreement, an international legal treaty. This is not to say that there is a complementarity regime in the law of development cooperation, whereby certain roles and responsibilities of recipient states would automatically move to international organizations or other implementing agencies if the state lacked sufficient capacity.⁹⁷⁷ Under exceptional circumstances, however, international development organization can use the described provisions to *de facto* limit the

⁹⁷³ *Supra* chapter V.2 c). Notably, this arrangement is explicitly restricted in time “for as long as the circumstances justified”, a qualification that again serves to safeguard the long-term objective of state-building.

⁹⁷⁴ On the concept of responsibility to protect, see *supra* note 202; and on its application as a normative framework to justify the provision of humanitarian assistance without government consent, see REBECCA BARBER, 'The Responsibility to Protect the Survivors of Natural Disaster: Cyclone Nargis, a Case Study', 14 *Journal of Conflict & Security Law*, 3 (2009). The responsibility to rebuild forms part of the concept, and refers specifically to the responsibility of international actors to assist in post-conflict reconstruction following an intervention. On the international community's responsibility to rebuild institutional structures and social cohesion in fragile states, see LADWIG & RUDOLF, 'International Legal and Moral Standards of Good Governance in Fragile States'.

⁹⁷⁵ Notably, this sort of justification suffers similar shortcomings as the concept of responsibility to protect – for instance, who decides, and on the basis of what criteria, whether a government has a particular level of capacity or willingness. See also *infra* section 2 of this chapter.

⁹⁷⁶ See, for instance, DAVID WILLIAMS, 'Aid and Sovereignty: Quasi-states and the International Financial Institutions', 26 *Review of International Studies*, 557 (2000); or LINDSAY WHITFIELD & ALASTAIR FRASER, 'Introduction: Aid and Sovereignty', in Lindsay Whitfield (ed) *The Politics of Aid. African Strategies for Dealing with Donors* (Oxford University Press, 2009); and in the context of conflict-affected and fragile states, e.g. BOON, "'Open for Business": International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law'; or CINDY DAASE, 'Liberia's Governance and Economic Management Assistance Programme – A New Model of Shared Sovereignty?', 71 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 493 (2011).

⁹⁷⁷ Some international legal regimes operate on the basis of a principle of complementarity, whereby certain responsibilities of the state can pass on to the international level if the state is “unable or unwilling” to fulfill them. See *supra* chapter I.3 b). The described provisions in the law of development organizations, however, remain the exception and incomprehensive.

sovereignty or ownership of recipients based on the perceived degree of government capacity.

In sum, the law of development cooperation has not necessarily become less state-centric. Quite the contrary, the emergence of state-building as a development paradigm and regulatory theme entails that the project of statehood, and with it the formal commitment to sovereignty and national ownership, remain central. Yet the growing engagement of international development organizations with fragile states has highlighted a peculiar paradox – development cooperation is premised on the existence of ‘effective government’, and simultaneously concerned with strengthening government effectiveness.⁹⁷⁸ Development organizations have therefore sought to adapt the premises and the rules on which they operate.

A more complex and delicate question in dealing with fragile states remains how to deal with governments that are unable or unwilling to authorize, lead, and “own” processes of development policy-making and implementation. The emerging response of development organizations has regularly involved substituting, at least temporarily, for roles and responsibilities traditionally accorded to recipient governments. Arguably, ownership thus turns into an objective of development cooperation, which to achieve requires certain adjustments in the short term.

Finally, although we have seen certain patterns emerge, it is important to note that the regulatory approach of international development organizations to fragile states is overall not very systematic, and only partly formalized. Some challenges that development organizations (in remarkable unanimity) associate with engaging in fragile states have been addressed much more systematically through legal and policy reforms than others. For instance, all organizations have simplified procedural requirements to facilitate more rapid engagement. In contrast, the majority of questions that concern how development organizations engage in the absence of effective government counterparts have not been subject to comprehensive regulation. Moreover, the same issue has sometimes been addressed by one organization through the formal adoption or modification of rules, and by another through the use of less formal rule-making processes, or on an *ad hoc* basis.⁹⁷⁹

⁹⁷⁸ On this paradox, see *supra* chapter II.2 a).

⁹⁷⁹ For instance, all MDBs have prepared guidelines for dealing with *de facto* governments, but each has therefore chosen a different form. See *supra* chapter V.2 a).

The resulting impression of a regulatory piecemeal approach and halfway formalization is partly owed to the fact that the processes analyzed are still very much ongoing. It can also be intentional. Either way, it raises the question as to the value of (more) regulation in guiding a differentiated approach to dealing with fragile states.

2. Potentials and Perils of Regulating Development Cooperation with Fragile States

To engage differently with fragile states, international development organizations have increasingly modified rules that govern how development cooperation is normally planned, managed, and implemented. Evaluating the developmental effects of such adaptations – e.g. their potential to make development cooperation with fragile states more effective or sustainable – exceeds the scope and means of this thesis.⁹⁸⁰ Nor can I provide a clear answer to the fundamental question whether fragile states indeed constitute a challenge of a different kind, one that warrants a specifically tailored response.⁹⁸¹ On the one hand, the comparatively poor track record of development cooperation in weak-capacity and politically unstable environments in the past speaks for the need to reconsider unrealistic premises, and to develop more adequate approaches and aid instruments. On the other hand, the concern with fragile states rests on a vastly ambiguous concept, which fails to capture the immense diversity of causes, symptoms, and consequences of instability and underdevelopment in these countries.

International legal scholars are, however, well-placed to explore the potentials and perils of regulating a differentiated approach towards fragile states – a question that is also of great relevance for development practitioners. By regulating, I mean that international development organization specifically adopt new rules or modify existing rules of their legal frameworks to guide their engagement with fragile

⁹⁸⁰ First of all, it would require an assessment of whether and how development organizations apply and implement the relevant rules in practice. For this we would need empirical information that not even the organizations themselves necessarily have – and if so, information may still be considered confidential. On the continuing debate about the desirability and feasibility of development operations focusing on state-building in fragile states, see the references in *supra* note 931.

⁹⁸¹ More than one decade after fragile states started becoming a key concern for the international development community, this question remains relevant and controversial. See, for instance, WOOLCOCK, 'Engaging with Fragile and Conflict-affected States. An Alternative Approach to Theory, Measurement and Practice'; CHANDY, 'Ten Years of Fragile States. What Have We Learned?'; or BERTOLI & TICCI, 'A Fragile Guideline to Development Assistance'; and with a more positive perspective on the results of differentiated approaches in fragile states, HELLMAN, Surprising Results from Fragile States.

states.⁹⁸² A look at the internal reform and rule-making activities of various organizations is enough to show that there is demand for guidance in dealing with fragile states, including more formalized guidance. Yet the analysis of the World Bank, AfDB, ADB, and EU, has also revealed a number of potentials and perils involved where international organizations adopt or modify rules that govern the transfer of ODA to fragile states.

In exploring the value of regulating a differentiated approach to fragile states, we need to distinguish two aspects. The two aspects are closely linked, but entail different sorts of arguments. On the one hand, a number of arguments speak for or against adapting existing rules to the context of fragile states. International development organizations already operate on the basis of rules, which are contained in their statutes and secondary rules. Broadly speaking, do these existing rules require adaptation vis-à-vis fragile states? On the other hand, even after accepting the premise that fragile states require a differentiated approach, a number of arguments can be made for and against development organizations adopting regulation to specify how they deal with fragile states. While the first aspect thus concerns the tension between adaptation and stability as an inherent characteristic and value of law given its counterfactual nature, the second aspect essentially concerns the pros and cons of using rules to control and govern conduct. The decision to adapt existing rules usually implies that the organization favors a more formalized response in dealing with fragile states. Yet particularly for organizations with a legal framework that *prima facie* poses fewer barriers to engaging with fragile states, the question remains whether or not to adopt specific rules to guide and constrain operations in fragile states.

a) Potentials

On this basis, the lawyer and optimist starts with the potentials of adapting existing rules to state fragility, and using regulation to consolidate a differentiated approach. There is much to be said about law's counterfactual nature, and that of the

⁹⁸² On the law of development cooperation and the legal nature of the rules that govern the conduct of international development organizations in particular, see *supra* chapter III.1. Accordingly, I focus here on rules that are contained either in the statute and thus international legal norms, or in secondary rules, including internal rules that are relatively formalized and considered binding on the organizations' staff (as opposed to non-binding rules that belong to their policy framework). In the case of the EU, rules that govern the conduct of development cooperation are contained not only in EU primary and secondary law, but also in an international legal treaty, the Cotonou Agreement.

principle of sovereign equality in particular.⁹⁸³ To some extent, however, law needs to take into account differing and changing circumstances,⁹⁸⁴ Development organizations that operate on the basis of rules that presume all recipient governments have the same, basic capacity to fulfill an array of requirements may find that these requirements pose an excessive burden on the already weak capacities and limited resources of fragile states, or simply cannot be met.⁹⁸⁵ Adapting particularly demanding requirements to account for the different implementation capacity of fragile states is thus a matter of equity and fairness, central ideas of the concept of differential treatment.⁹⁸⁶ According to David Bradlow, development organizations are even required by the legal principle of non-discrimination to apply the same rules “in a way that is responsive to similarities and differences in the situation of each member state”, and “those who are differently situated should receive different treatment that reflects the differences in their situation”.⁹⁸⁷

At the same time, adapting rules to empirical differences between recipient countries can increase the effectiveness of rules, i.e. their ability to achieve regulatory objectives. For example, where countries simply lack the capacity to meet fiduciary, environmental, or social standards that are regularly preconditions for aid, they may not receive ODA – but the respective standards are also not implemented, and hence remain ineffective. Accordingly, better tailoring particularly those rules that create obligations for recipient countries to the different capacity of state institutions can ultimately enhance compliance, in particular if complemented with targeted technical assistance and capacity-building to strengthen implementation.⁹⁸⁸ To some extent, this model is already reflected in the World Bank’s new Program-for-Results Financing

⁹⁸³ On the crucial role of the formal protection of sovereign equality, particularly in an environment like development cooperation that is characterized by material inequality and structural power discrepancies, see already *supra* p. 13 and chapter I.3 b).

⁹⁸⁴ For a general discussion of the challenge of ensuring international law’s flexibility in light of evolving societal preferences or realities, see, for instance, FEICHTNER, *The Law and Politics of the WTO Waiver. Stability and Flexibility in Public International Law*, Part I, Chapter 2; and on the stability versus change debate in the law of treaties, BINDER, ‘Stability and Change in Times of Fragmentation: The Limits of Pacta Sunt Servanda Revisited’.

⁹⁸⁵ On this point, see also the references in *supra* note 208.

⁹⁸⁶ On the concept of differential treatment, see *supra* section 1 of this chapter, and the references in *supra* note 946.

⁹⁸⁷ BRADLOW, ‘The Reform of Governance of the IFIs: A Critical Assessment’, at 47. The use of differential treatment for LDCs, and increasingly for conflict-affected countries, in the EU’s legal framework for development cooperation provides an example. See *supra* chapter V.2 d).

⁹⁸⁸ In this context, see ABRAM CHAYES & ANTONIA HANDLER CHAYES, *The New Sovereignty. Compliance with International Regulatory Agreements* (Harvard University Press, 1998) on the “managerial” (as opposed to “enforcement”) model of treaty compliance.

instrument, and the AfDB's and the ADB's reformed system of environmental and social safeguards.⁹⁸⁹

A further argument concerns the need for law to take into account changing circumstances over time. Particularly the statutes of the MDBs often date back to the early years of development cooperation post-World War II, and contain rules that are not suitable for guiding the activities of development organizations in a global political environment that has substantially evolved since then. Certainly, it is highly doubtful whether state fragility itself is a new phenomenon, and thus a product of changing circumstances.⁹⁹⁰ Some of the circumstances that are commonly associated with fragile states may well constitute (and always constituted) the normal state of affairs in many countries. What has clearly changed, however, is how international development organizations conceive and address underdevelopment and inequality in countries with weak institutions, poor governance, and political instability. With the evolving understanding of what 'development' entails, organizations have taken on an expanding range of activities related to building or strengthening state capacities in areas well beyond economic affairs.⁹⁹¹ If the legal frameworks of international development organizations do not sufficiently reflect this evolving role, their ability to guide and constrain relevant activities is accordingly diminished.

For example, the World Bank has prepared an internal rule and the General Counsel a legal opinion to clarify the boundaries of the Bank's mandate in the context of post-conflict and humanitarian assistance.⁹⁹² The organization has thus sought to provide a framework for the Bank's expanding role, which neither the AfDB, nor the ADB has done.⁹⁹³ The example of the World Bank also illustrates that adapting rules of the legal framework to changing circumstances does not necessarily require a formal amendment of the statute, a process that is often cumbersome.⁹⁹⁴ A more common tool is interpretation, and of particular importance in the practice of

⁹⁸⁹ See *supra* chapter IV.4 c) on the World Bank's PforR financing instrument, and on the integrated safeguards systems of the AfDB and ADB, *supra* note 956.

⁹⁹⁰ See *supra* chapter I.2, where I argue that the growing concern with fragile states in the international community is equally the product of changing circumstances, and changing perceptions.

⁹⁹¹ On the evolving understanding of development and the consequences for the mandate and activities of development organizations, see already *supra* chapter III.2.

⁹⁹² See *supra* chapter IV.1 b), and for a detailed analysis of the relevant internal rule, OP 2.30, chapter IV.3 a).

⁹⁹³ Available guidance is scattered throughout several, mostly non-binding rules. For an overview, see *supra* chapter II.3 b).

⁹⁹⁴ *Supra* note 535.

development organizations, the adoption of internal rules.⁹⁹⁵ What form of adaptation is the most appropriate depends on each case, though in some cases, formal amendments can still be preferable over an often excessive use of interpretation, particularly informal, implied interpretations.⁹⁹⁶ In principle, however, an argument can be made that adapting rules is preferable over an excessive use of exceptions where differing or changing circumstances lead to structural problems for which existing rules are systematically inadequate.⁹⁹⁷

This brings us to the second aspect and set of arguments, which concern the advantages of international organizations using regulation, rather than more *ad hoc* approaches, to instruct development cooperation with fragile states. Rules – if they are appropriate and relevant – quite simply provide guidance. They provide guidance through establishing limits, but also in the more positive sense of steering conduct, e.g. specifying how and by whom a certain issue or situation is supposed to be addressed. International organizations have an interest themselves in the internal rationalization of decision-making processes.⁹⁹⁸ Oftentimes, they adopt rules to regulate processes and procedures to be followed, and define the roles and responsibilities of different actors. Particularly where such guidance is stipulated in rules that are at least partly formalized and considered binding, it comes with the promise of enhancing clarity, transparency, consistency, and accountability in decision-making concerning fragile states.⁹⁹⁹

First, regulation provides *ex ante* clarity. Considering that international development organizations are often huge bureaucracies with more or less decentralized structures, clarity and legal certainty can be essential to reducing

⁹⁹⁵ I elaborate the role of internal rules in adapting the legal frameworks of development organizations in *supra* chapter III.1, and with specific regard to the World Bank, in chapter IV.1 b). In contrast to the MDBs, the legal framework governing the EU's development cooperation is mostly set out in more recent, legal sources and not just the founding treaties. It is thus easier to adapt to changing circumstances than those of the MDBs. See *supra* chapter V.2.a).

⁹⁹⁶ See *supra* chapter IV.3 c), where I argue that World Bank engagement at the request of the international community would have required an amendment of the Articles of Agreement, rather than an internal rule in combination with an implied interpretation of the Executive Directors.

⁹⁹⁷ FEICHTNER, *The Law and Politics of the WTO Waiver. Stability and Flexibility in Public International Law*, 325.

⁹⁹⁸ See VON BERNSTORFF, 'Procedures of Decision-Making and the Role of Law in International Organizations', 797.

⁹⁹⁹ In this section, I focus on rules that form part of the legal framework of international development organizations, in contrast to the non-binding rules that form part of their policy frameworks (on this distinction, see the Introduction). As noted before, however, non-binding rules can also be effective at steering behavior, and enhance the clarity, transparency, and consistency of decision-making processes. See *supra* chapter III.1.

transaction costs.¹⁰⁰⁰ For example, a rule that establishes clearly in what situation and to what extent environmental and social standards can be postponed for fragile states reduces transaction costs that result from uncertainty, e.g. in terms of staff time that is lost going through a difficult debate about the appropriate response. Lower transaction costs also enable a speedier and more efficient response, which is particularly crucial in addressing time-sensitive needs in conflict-affected and fragile states.

Second, regulation enhances transparency by laying open the decision-making criteria, processes, and responsibilities to those involved and those affected by decision-making, or the interested public at large. With the publication of guidelines that regulate dealings with *de facto* governments, for instance, the World Bank, AfDB, and ADB, have disclosed who, on the basis of what criteria, decides whether cooperation continues with a government that came to power by unconstitutional means.¹⁰⁰¹ Besides, published rules that provide transparency regarding an expected behavior constitute a condition for basically any form of review or broader public scrutiny.

Particularly where rules are linked to enforcement and review mechanisms, they also lead to more consistent decision-making – a third, inherent promise of regulation. More consistent decision-making procedures and outcomes result in greater predictability, which again reduces transaction costs. Further, consistent decision-making is a matter of fairness, reduces the risk of discrimination, and increases legitimacy. For example, if the AfDB provides additional resources to certain countries outside of its performance-based system of resource allocation, the stipulation of clear eligibility criteria leads to more consistent decisions, which are more likely to be perceived as equitable by all member countries.¹⁰⁰² In contrast,

¹⁰⁰⁰ See, for instance, LEROY, 'The Bank's Engagement in the Criminal Justice Sector and the Role of Lawyers in the "Solutions Bank": An Essay'; SIA SPILIOPOULOU AKERMARK, 'Soft Law and International Financial Institutions – Issues of Hard and Soft Law from a Lawyer's Perspective', in Ulrika Mörtz (ed) *Soft Law in Governance and Regulation. An Interdisciplinary Analysis* (Edward Elgar, 2004), pp. 68-70; from the perspective of organization theories, GÖHRAN AHRNE & NILS BRUNSSON, 'Soft Regulation from an Organizational Perspective' in *ibid.*; or ROBERT WADE, 'Greening the Bank: The Struggle over the Environment, 1970-1995', in Devesh Kapur, et al. (eds), *The World Bank. Its First Half Century. Volume 2: Perspectives* (Brookings Institution, 1997), 729, stating "the larger the organization, the greater the need for rules."

¹⁰⁰¹ See *supra* chapter IV.3 b) (World Bank) and chapter V.1 a) (AfDB and ADB). However, I show later in this section why the *de facto* government guidelines constitute a rather imperfect example of transparency.

¹⁰⁰² On the AfDB's Fragile States Facility, see *supra* chapter V.1 b).

inconsistent decision-making, whether real or apparent, eventually weakens the legitimacy of an organization.¹⁰⁰³

Fourth, rules that are linked to mechanisms of review are not only more likely to result in more consistent decision-making, but also greater accountability of decision-makers. The MDBs, for instance, have established quasi-judicial review mechanisms that can investigate staff compliance with binding, internal rules.¹⁰⁰⁴ Such mechanisms are of particular relevance given that the avenues to hold international development organizations to account for their actions are in general very limited.¹⁰⁰⁵

In addition to these attributes, a further potential of regulation lays in the process whereby rules are made. In principle, rule-making can be understood as a deliberative process, whereby international development organizations need to reflect, to consider and balance different view and arguments, and ultimately to take an informed decision. In that sense, the adoption of rules to regulate different aspects of engaging with fragile states can *prima facie* enhance the rationality as well as legitimacy of subsequent decision-making. Obviously, this is more likely to be the case where the process of formulating and adopting regulation follows a transparent and formalized process, in which at least the affected, if not all interested stakeholders can participate. The World Bank's internal rule-making process, for example, has become gradually more public and participatory, even if the relevant administrative procedures are yet codified.¹⁰⁰⁶

¹⁰⁰³ See, for instance, HUNTER, 'International Law and Public Participation in Policy-making at the International Financial Institutions', 211-212, on procedural fairness as a source of legitimacy.

¹⁰⁰⁴ See *supra* chapter IV.1 a) on the World Bank's Inspection Panel and other mechanisms to review compliance with OPs/BPs; and on the potential of (internal) rule-making in opening up avenues for judicial or quasi-judicial review and enhancing accountability, BRADLOW & NAUDÉ FOURIE, 'The Operational Policies of the World Bank and the International Finance Corporation. Creating Law-Making and Law-Governed Institutions?'; or HUNTER, 'International Law and Public Participation in Policy-making at the International Financial Institutions', 236.

¹⁰⁰⁵ On the still rudimentary and often insufficient mechanisms of accountability in the law of development cooperation, see DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, chapter 9 (pp. 452-460 on the World Bank and pp. 460-471 on the EU); and *infra* section 3 of this chapter.

¹⁰⁰⁶ In detail, see HUNTER, 'International Law and Public Participation in Policy-making at the International Financial Institutions'. For example, Operational Policy 9.00 adopted in 2012 to regulate the Bank's PforR Financing is the result of extensive internal deliberations, as well as broad consultations with governments, parliamentarians, international partners and civil-society organizations. See THE WORLD BANK, 'A New Instrument to Advance Development Effectiveness: Program-for-Results Financing', paras. 2-4. Needless to say that resulting from multilateral treaty negotiations between the EU and the ACP states or formal amendments, the rules of the Cotonou Agreement are *per se* more legitimate, in the sense of being directly based on state consent.

b) Perils

A number of fundamental concerns, however, need to be considered before adapting existing rules to reflect empirical circumstances. Such concerns are particularly serious when considering the stakes of the debate: the sovereign equality of all states, which development organizations are bound to respect.¹⁰⁰⁷ Moreover, the emerging practice of different development organizations provides a number of reasons that speak against the use of regulation, as opposed to more *ad hoc* approaches in dealing with fragile states.

To start, a more cautious perspective leads to the question whether the adaptation of existing rules always serves to accommodate differing circumstances or needs of fragile states. One obvious alternative are wider political motivations. The capacity of state institutions is generally not easy to measure.¹⁰⁰⁸ Many fragile states may appear weak with regards to some state functions, but rather strong with regards to others. Even acknowledging that the capacity of state institutions in fragile states is typically weak, it is not necessarily weaker than that of other LDCs, nor are the needs of fragile states necessarily different. Against this background, what is presented as differential treatment to account for the disadvantaged position of fragile states may as well unduly disadvantage other recipient states.¹⁰⁰⁹ When development organizations lower or postpone established environmental, social, or other standards for fragile states, for instance, it might also be to facilitate engagement in countries that are of particular interest to the organization or its donors. This suspicion arises where the respective rules leave it essentially to the discretion of political organs of the organization to decide what countries are subject to differentiated treatment.¹⁰¹⁰ Besides, the apparent preoccupation with the weak capacity of fragile states has rarely led development organizations to adopt specific measures that ensure weaker countries enjoy a meaningful level of procedural participation in structures of decision-making.

¹⁰⁰⁷ See *supra* note 25; and on the protection of sovereignty in the legal frameworks of international development organizations in particular, *supra* chapter III.2.

¹⁰⁰⁸ See *supra* chapter II.1 on different attempts to measure state fragility, and chapter IV.2 b) on the shortcomings of the World Bank's CPIA-based measurement and classification of fragile states. For instance, development organizations tend to assess the capacity of formal institutions at the level of the central state, and thus ignore that informal institutions and non-state actors may be very effective at providing basic services.

¹⁰⁰⁹ See also *supra* chapter IV.4 d), where I discuss the use of differential treatment by the World Bank against the background of a principle of equal treatment of all member states.

¹⁰¹⁰ For example, the World Bank's regulatory framework for budget assistance allows certain social, environmental, and fiduciary considerations to simply be sidelined if there is not "sufficient time or country capacity" to address them. See *supra* chapter IV.4 b).

A cautious perspective is also needed when considering the adaptation of existing rules, particularly the statutes of international development organizations, to changing circumstances over time. Evidently, if rules are always adapted in line with the expanding activities of an organization in practice, they become oblivious. The stability and continuity of established rules in light of changing circumstances, however, should not be easily discarded. The global political environment in which international development organizations operate has certainly changed considerably since the end of the Cold War, and again since the terrorist attacks of September 11, 2001. Yet there is also a certain tendency to define everything as new development challenge, and hence justify an expanding array of activities in response.¹⁰¹¹ At least to some extent, the growing concern of development organizations with fragile states – and consequently with a range of activities from justice and security sector reforms to strengthening state-society relations – reflects this pattern. While there is not always a bright-line test to answer what activities still correspond to an organization's original objectives and purposes, the mandates of international development organizations are still the most potent means in setting limits to the phenomenon of mission creep.¹⁰¹² The political prohibition clause of the World Bank and other MDBs, for instance, might appear anachronistic. Yet, it still constitutes the most important protection of member states' sovereignty, while it helps to focus the organizations' limited resources on core competences.¹⁰¹³

Next to these broader concerns and arguments pertaining to the adaptation of existing rules vis-à-vis fragile states, we can question the specific value of regulation to guide development cooperation with fragile states, as opposed to more *ad hoc* approaches. The central argument against regulation in general is that it reduces flexibility. Whether rules establish limits or otherwise guide conduct, regulation *prima facie* reduces the room for decisions to be tailored to the specific circumstances of each case. We have seen that fragile states are characterized by extremely heterogeneous conditions, however, which are hardly amenable to one-size-fits-all

¹⁰¹¹ Koskenniemi refers to this tendency as the “politics of re-definition”. See KOSKENNIEMI, 'The Politics of International Law - 20 Years Later', 10; and *supra* chapter I.1.

¹⁰¹² On mission creep, see *supra* note 472.

¹⁰¹³ With a detailed discussion of the pros and cons of maintaining the political prohibition clause, CISSÉ, 'Should the Political Prohibition in Charters of International Financial Institutions be Revisited? The Case of the World Bank'.

approaches.¹⁰¹⁴ Moreover, the value of regulation is reduced considering that fragile states are commonly associated with volatile circumstances and quickly evolving needs.¹⁰¹⁵ It is thus extremely difficult for rule-makers to design rules and regulations that are adequate not only for a large variety of countries and situations, but also to anticipate all kinds of future scenarios and challenges.

Further, to what extent regulation in fact enhances the clarity, transparency, consistency, and accountability of international organizations' decision-making varies greatly. Rules that are formulated in broad terms or leave considerable discretion to decision-makers – though perhaps desirable in terms of flexibility – provide little *ex ante* clarity. For instance, the internal rules that the World Bank and the AfDB have adopted to regulate dealings with *de facto* governments require staff to assess whether a government exercises “effective control”, a test that is difficult for staff to apply in practice.¹⁰¹⁶ The EU has made “differentiation” a fundamental principle of cooperation with ACP and non-ACP countries, but to what extent concrete rules can be tailored to the different circumstances of recipient countries is often not clear.¹⁰¹⁷

Transparency, in turn, certainly increases where the rules that inform decision-making criteria, process, and competences are published. Yet we have seen that the actual process whereby rules are applied and decisions made all too often remains obscure.¹⁰¹⁸ Again, the example of the World Bank's *de facto* governments policy is instructive. Though the decision-making criteria are stated in the policy, staff assessments and weighting of different criteria take place behind closed doors, the transcripts not being publically available. This lack of transparency and accordingly public scrutiny can also be seen to hamper processes of institutional learning, as

¹⁰¹⁴ On the extreme heterogeneity of fragile states that appears to inhibit any form of uniform definition, let alone policy response, see *supra* chapter I.2 b), and the discussion pertaining to the World Bank in *supra* chapter IV.2 b).

¹⁰¹⁵ E.g. MARC, et al., *Societal Dynamics and Fragility. Engaging Societies in Responding to Fragile Situations*, 147-148, arguing that fragile and conflict-affected countries require “more flexible approaches, judgment calls, no rigid, risk-averse planning and sequencing, since institutional change is no linear process”; or WOOLCOCK, ‘*Engaging with Fragile and Conflict-affected States. An Alternative Approach to Theory, Measurement and Practice*’.

¹⁰¹⁶ See *supra* chapter IV.3 b) and c) for an analysis of the World Bank's OP 7.30 on “Dealings with *De facto* Governments”.

¹⁰¹⁷ *Supra* chapter V.2 d).

¹⁰¹⁸ See the evaluation of the World Bank's internal rules concerning fragile states in *supra* chapter IV.3 c) and 4. d). Also BRADLOW & NAUDÉ FOURIE, ‘The Operational Policies of the World Bank and the International Finance Corporation. Creating Law-Making and Law-Governed Institutions?’, 27; and criticizing the information disclosure policy of the World Bank and the ADB from a human rights perspective, SANAE FUJITA, *The World Bank, Asian Development Bank and Human Rights. Developing Standards of Transparency, Participation and Accountability* (Edward Elgar, 2013), 85ff.

Nesbitt points out, reducing “the guidance that precedents can provide when new and difficult situations arise.”¹⁰¹⁹

Knowledge about precedents could also help to make decision-making processes more consistent – for consistency, too, does not necessarily follow from the existence of rules *per se*, but from their application in practice. On the one hand, the potential of rules to enhance the consistency of decision-making outcomes depends on their ability to trigger compliance, which is generally more likely if they are linked to enforcement and accountability mechanisms. With regards to the World Bank and other MDBs, as well as the EU, this is only partly the case, as available mechanisms are usually not geared towards allowing recipient states to call for a compliance review, or challenge specific operational decisions.¹⁰²⁰

On the other hand, rules lead to more consistent decisions when they provide clear guidance, and to more consistent decision-making processes in the sense of procedural regularity if they formulate procedural requirements. Rules that are vaguely formulated, without providing decision-making criteria or regulating the decision-making process can thus still result in arbitrary decision-making. For example, the provision in Operational Policy 2.30 that permits the World Bank to engage outside the territories of member states if deemed “for the benefit of members” is so subjective that it does little to prevent decision-making to be perceived as arbitrary.¹⁰²¹ Notably, we have seen that organizations do not always aspire to consistency. The Art. 96 procedures of the Cotonou Agreement leave it deliberately open for the EU Commission to decide when to trigger sanctions against a country, and it is no secret that the decision is guided by political considerations.¹⁰²²

Finally, processes of rule-making might entail deliberations and potentially enhance the rationality of subsequent decision-making, but to what extent they do

¹⁰¹⁹ NESBITT, 'The World Bank and De Facto Governments. A Call for Transparency in the Bank's Operational Policy', 646.

¹⁰²⁰ See DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 459, arguing that the World Bank is prominently accountable to its richer member states through various mechanisms, but member states that depend on the Bank's loans and grants are in a weak position to challenge its decisions and hold the organization accountable. The EU presents an entirely different case, in that it is generally subject to much more formal forms of judicial review. The means for recipients of EU aid to hold the organization accountable are, however, minor compared to those of EU member states. In detail, see *ibid.*, at 462 and 471.

¹⁰²¹ The same can be said for another provision in OP 2.30, which states that the World Bank can engage at the “requests from the international community, as properly represented” in countries with no government in power. For a detailed analysis of OP 2.30, see *supra* Chapter IV.3 a) and c).

¹⁰²² *Supra* chapter V.2 b) on Article 96 of the Cotonou Agreement, which regulates the use of sanctions in response to alleged violations of human rights, democratic principles, or the rule of law. Notably, the decisions of the EU Commission are nonetheless public.

once again varies greatly. As illustrated before, a large part of the rule-making processes of international (development) organizations are in fact internal, allowing for little or no participation of those potentially affected, not even member states.¹⁰²³ Internal rules in particular often emerge from relatively informal processes, and are subject to few legal constraints. Through such internal rule-making, often in combination with informal or implied interpretations, regulation can perhaps be adopted (or adapted) more easily, but it does not necessarily add to the broader legitimacy of subsequent decision-making.

The World Bank's Operational Policy 2.30 is a striking example. Apparently based on an interpretation that is not, however, publically available, the World Bank has therein adopted a provision establishing that in the absence of a government in power, a request from the international community could replace an official government request.¹⁰²⁴ Besides the question whether the provision would have required a formal amendment of the Articles of Agreement, the rule-making process clearly lacked transparency and participation.¹⁰²⁵ In turn, looking at the rule-making processes of the EU, we see two extremes. Whereas rules that govern development cooperation with ACP countries result from formal multilateral treaty negotiations, cooperation with all other countries is governed by a set of EU Regulations – which were certainly adopted in a formalized process, but still without the participation of recipient countries.¹⁰²⁶

Ultimately, understanding the perils of formalizing a differentiated approach to fragile states requires a look at the rule-making actors. At the outset, international organizations already suffer from weak democratic legitimacy and accountability.¹⁰²⁷

¹⁰²³ See *supra* chapter III.1, and concerning the World Bank's internal rule-making and use of implied interpretations, chapter IV.1 a).

¹⁰²⁴ *Supra* chapter IV.3 a) and c).

¹⁰²⁵ The World Bank's process of internal rule-making has perhaps become more open and participatory in recent years (see *supra* note 526). However, the administrative practice of holding broad consultations when preparing an OP/BP has not yet been codified, and accordingly, not always applied.

¹⁰²⁶ See *supra* chapter V.2 a) on the EU's dual legal framework for development cooperation and the different legal nature of its rules. In the law of EU development cooperation, there is thus a characteristic interaction between formal multilateralism and more unilateral modes of rule-making.

¹⁰²⁷ On the accountability of international organizations, a topic that is widely researched and subject of an ongoing discourse, see, for instance, AUGUST REINISCH, 'Securing the Accountability of International Organizations', 7 *Global Governance*, 131 (2001); ROBERT O. KEOHANE, 'Global Governance and Democratic Accountability', in David Held & Mathias Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (Polity Press, 2003); the Report INTERNATIONAL LAW ASSOCIATION, 'Final Report on the Accountability of International Organizations' (2004); and the according analysis by IGE F. DEKKER, 'Making Sense of Accountability in International Institutional Law. An Analysis of the Final Report of the ILA Committee on Accountability of International

Yet, international development organizations are in a position to wield considerable power vis-à-vis recipient states that are structurally dependent on aid.¹⁰²⁸ Development organizations also wield power in making or adapting rules that set the terms upon which fragile states receive ODA – activities that constitute a “significant form of governance”.¹⁰²⁹ Not least to make this exercise of public power less arbitrary, I conclude with some recommendations concerning the rule- and decision-making processes of international development organizations.

3. Conclusion and Recommendations

In this chapter, I synthesized and discussed the key findings of how, and to what effect, the World Bank, the AfDB, the ADB, and the EU have adapted their legal and policy frameworks vis-à-vis fragile states. All organizations have introduced more differentiation and greater flexibility in the rules that govern the transfer of ODA, responding to the capacity constraints and volatile circumstances they associate with fragile states. To deal with situations where there is no government capable to authorize and implement development projects or programs, all organizations have developed substitutional arrangements that to some extent qualify the requirements of state consent and protections of ownership, at last in the short term. Accordingly, I argued that the central objective of state-building in fragile states also informs the adaptation of development organizations’ legal and policy frameworks – namely, adjusting rules to reflect the limited capacity of state institutions in the short term, while remaining committed to strengthening state capacity in the long term. Acknowledging that the identified patterns are not very systematic and only partly formalized, I examined the value of international development organizations using (more) regulation to guide their dealings with fragile states. I considered arguments

Organizations from a Conceptual Legal Perspective', 36 *Netherlands Yearbook of International Law*, 83 (2007); as well as the references to GAL (*supra* note 442), IPA (*supra* note 444), and other approaches (*supra* note 441) concerned with the governance activities of international organizations in *supra* chapter III.1

¹⁰²⁸ On the legitimacy problem of development cooperation in general and with regards to rule-making processes in particular, see DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, pp. 510-513; and with proposals to enhance the accountability of international development organizations, see, for instance, MAC DARROW & AMPARO TOMAS, 'Power, Capture, and Conflict. A Call for Human Rights Accountability in Development Cooperation', 27 *Human Rights Quarterly*, 471 (2005); KAREN HUDES & SABINE SCHLEMMER-SCHULTE, 'Accountability in Bretton Woods', 15 *ILSA Journal of International and Comparative Law*, 501 (2008-2009); and BRADLOW & HUNTER (eds), *International Financial Institutions and International Law*.

¹⁰²⁹ *Supra* note 44.

for and against adapting existing rules to differing or changing circumstances – and more generally, for and against using formal rules to guide the conduct of international organizations.

Ultimately, the practice of the World Bank, the AfDB, the ADB, and the EU provides ample evidence of both, the potentials and the perils of using regulation to instruct and formalize a differentiated approach to fragile states. Whether we want more or less regulation is thus difficult to say in general. The answer depends on the content and design of the relevant rules, and as illustrated, on the process whereby rules are made.

Legal scholars have an inherent bias towards law, which I cannot defy. Based on the preceding analysis, there are a number of instances where regulation in fact appears desirable in terms of more clarity, transparency, and consistency. Rules can guide decision-makers in how to adapt overly unrealistic and stringent *ex ante* requirements when engaging in countries with weak capacities, without compromising environmental, social, or fiduciary standards altogether. Rules can assist staff in balancing short-term substitution with long-term capacity-building support, responding to time-sensitive needs without violating the principle of sovereignty or abandoning the idea of national ownership. Rules could also require international development organizations to engage more systematically with local stakeholders particularly in countries with no effective government, an area that is currently subject to little regulation, if any.¹⁰³⁰ Such rules do not need to hinge on a clear definition or classification of “fragile states”, an ambiguous notion of little analytical or operational value. Moreover, rules that inform the conduct of development organizations do not have to be overly prescriptive concerning the outcome of decision-making – and can still be useful in creating an analytical and procedural framework for informed decision-making, and in determining who decides, and can be held accountable.

If there is *prima facie* reason to believe in the potential of regulation to make development cooperation with fragile states more transparent, consistent, and ultimately principled, however, it is not without conditions. Not least with regards to

¹⁰³⁰ On this point, see also SAUL, 'From Haiti to Somalia: The Assistance Model and the Paradox of State Reconstruction in International Law', criticizing the sole reliance of external actors on state consent to legitimize interventions in states with barely effective governments. Saul finds that “there is an inherent need for flexibility in relation to who is given a voice”, and “[a]t present, this flexibility appears largely unregulated by international law.” (147).

the ambiguity and sometimes questionable agenda behind the notion of fragile states, it is of utmost importance that regulation used to instruct and formalize a differentiated approach is not a mere façade for political, or rather politicized decision-making. This requires, first of all, that rules be formulated in a way that provides a minimum level of clarity and predictability both to decision-makers within development organizations, and to countries affected by their decisions. Certainly, broadly formulated rules or principles are sometimes preferable over narrow rules, because they leave decision-makers the necessary discretion to address individual cases. However, discretionary powers can still be counterbalanced with procedural requirements that aim to ensure the transparency and rationality of decision-making – and similar requirements can be formulated with regards to the process whereby rules are made or modified in the first place.¹⁰³¹

In making concrete proposals to enhance the rule- and decision-making processes of international development organizations, we can draw on emerging legal approaches to governance activities of international organizations.¹⁰³² From the perspective of the GAL approach, how development organizations make or modify rules to engage with fragile states constitutes a form of regulatory administration.¹⁰³³ As such, it should adhere to administrative law principles that are familiar from domestic legal orders,¹⁰³⁴ but also increasingly expressed in the legal and policy frameworks of international organizations – e.g. standards of transparency, reason-

¹⁰³¹ After all, processes of rule-making essentially constitute processes of decision-making. See VON BERNSTORFF, 'Procedures of Decision-Making and the Role of Law in International Organizations', pp. 792, 795, distinguishing between rule-making decisions and operational decisions of international organizations, with the latter being those “taken in order to implement rules adopted in plenary or in the framework of explicitly or implicitly delegated tasks and mandates.”

¹⁰³² For an overview of legal approaches that have grappled with global governance phenomena, including activities of international organizations that reach beyond traditional sources of public international law, see *supra* chapter III.1. I focus here on the GAL approach, since it has a particularly problem-oriented approach, while focusing mostly on enhancing procedures of decision-making. Other proposals are more concerned with the international rule of law and internal constitutionalization of international organizations at large. See, for instance, SIMON CHESTERMAN, 'An International Rule of Law?', 56 *American Journal of Comparative Law*, 331 (2008); ARMIN VON BOGDANDY, 'The European Lesson for International Democracy: The Significance of Articles 9-12 EU Treaty for International Organizations', 23 *European Journal of International Law*, 315 (2012); and on proposals to make international organizations strictly adhere to human rights standards, VON BERNSTORFF, 'Procedures of Decision-Making and the Role of Law in International Organizations'.

¹⁰³³ *Supra* note 442.

¹⁰³⁴ KINGSBURY, et al., 'The Emergence of Global Administrative Law', 37-51; ESTY, 'Good Governance at the Supranational Scale. Globalizing Administrative Law'; or BRADLOW, 'The Reform of Governance of the IFIs: A Critical Assessment', 49-50, summarizing similar requirements concerning the rule- and decision-making of international financial institutions under a “principle of good administrative practice”.

giving, procedural participation, and review.¹⁰³⁵ Similarly, the report of the International Law Association (ILA) on the accountability of international organizations suggests that decision-making should respect principles like “procedural regularity”, or “objectivity and impartiality”.¹⁰³⁶

What would this mean, for example, for the World Bank’s regulatory activity concerning fragile states? Many of the analyzed Operational Policies were formulated in relatively broad terms, with few objective decision-making criteria or procedural requirements. To reduce the risk of Bank staff abusing the accorded discretionary powers, staff could be required to provide written justifications for their decisions, which need to be published and available to the public. To some extent, this has actually been put in place, e.g. where staff prepare an eligibility note outlining the reasons for extending additional financing to countries in “turn-around” situations.¹⁰³⁷ There is little reason for not applying this approach more broadly. Moreover, the World Bank’s Access to Information Policy adopted in 2010 recognizes the fundamental importance of transparency and accountability in decision-making. Nevertheless, the Bank is still not required to disclose certain “deliberative information”, an exception that the organization has too often used to keep decision-making that concerns the application of OPs/BPs secret.¹⁰³⁸

In some contexts, for example when Bank staff decide about continuing operations with a *de facto* government, affected governments could be granted the possibility to have their views considered prior to the decision being taken, or to challenge a decision once taken. So far, particularly recipient countries have very few avenues to request a review of the application of internal rules, let alone to demand accountability for wrongful decisions.¹⁰³⁹ A legal basis for demanding more

¹⁰³⁵ KINGSBURY, 'Global Administrative Law in the Institutional Practice of Global Regulatory Governance', at 9; or VON BERNSTORFF, 'Procedures of Decision-Making and the Role of Law in International Organizations', 797-798, showing how international organizations already rely on procedural requirements imported from a domestic rule of law tradition. With regards to the World Bank as well as the EU, see also DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, chapter 4; and concerning principles of participation in particular, HUNTER, 'International Law and Public Participation in Policy-making at the International Financial Institutions'.

¹⁰³⁶ INTERNATIONAL LAW ASSOCIATION, 'Final Report on the Accountability of International Organizations', 14.

¹⁰³⁷ See *supra* note 591.

¹⁰³⁸ World Bank Access to Information Policy (*supra* note 520), paras. 6 and 16.

¹⁰³⁹ See *supra* note 1020, also noting that recipient countries are unlikely to use the available avenues if they rely on World Bank financing. With its focus on the infringement of beneficiary rights, a quasi-judicial review of staff compliance with OPs/BPs through the Inspection Panel is of limited importance concerning the effects of the Bank’s decision-making on specific member states. See *supra* note 522.

consistent decision-making could come from the political prohibition clause in the Articles of Agreement. The clause requires the Bank to be impartial in its considerations, and this should also concern the application of internal rules to different countries.¹⁰⁴⁰ It is also important to note, however, that the analyzed rules concerning fragile states often grant the ultimate decision-making authority to the Executive Board, not the Bank's staff. Accordingly, the problem is not necessarily that staff members take inconsistent decisions, but that the Executive Board makes decisions that appear to be influenced by the political and strategic interests of its major shareholders, which hold the majority of votes.¹⁰⁴¹

Concerning the process of making OPs/BPs, the World Bank has increasingly published drafts of its internal rules and invited affected or interested parties to comment on them. In practice, the process has thus become more transparent and participatory already. To grant potentially affected member states, groups, or individuals a formal right to procedural participation, however, and guarantee minimum procedural benchmarks, the World Bank should codify this process.¹⁰⁴² In adapting existing rules of the legal framework, in turn, the organization should reconsider the appropriate use of implied interpretations, an informal practice of interpretation that is “certainly not a model of transparency”, as Hassane Cissé confirms.¹⁰⁴³

Considering such proposals to enhance the design of rules and processes of rule- and decision-making within international development organizations, regulation seems to indeed have the potential of making dealings with fragile states more transparent, consistent, and not necessarily less flexible.¹⁰⁴⁴ At the same time, the

¹⁰⁴⁰ *Supra* note 558. The requirement to ensure the impartial application of internal rules could be translated into certain procedural requirements, e.g. of procedural regularity, due diligence, etc.

¹⁰⁴¹ On the system of weighted voting, see *supra* chapter IV.1 a).

¹⁰⁴² See also HUNTER, 'International Law and Public Participation in Policy-making at the International Financial Institutions', 235-237; and BRADLOW & NAUDÉ FOURIE, 'The Operational Policies of the World Bank and the International Finance Corporation. Creating Law-Making and Law-Governed Institutions?', 59. Notably, at the time of writing, the Bank was in a process of reforming its system of internal rules, which could also entail the codification of the rule-making process. *Supra* note 525.

¹⁰⁴³ Cissé, 'Should the Political Prohibition in Charters of International Financial Institutions be Revisited? The Case of the World Bank', 86, further pointing out that since through interpretation rather than formal amendment, “small shareholders stand to be deprived of ‘protection of their interests guaranteed by high majority required for formal amendment.’”

¹⁰⁴⁴ Obviously, more concrete proposals concerning the design of rules, procedural requirements for decision-making, or the rule-making process, can only be formulated with regards to specific organizations and the issues they face. As a matter of principle, it should be noted that administrative decision-making with effects that are in fact predominantly internal should be subject to different requirements – e.g. in terms of effectiveness and efficiency – than decision-making with clearly external effects, where standards like participation and review are more important. On the dualistic

measures I discussed could help reduce some of the identified perils. Namely, that regulation entrenches a form of discrimination on the basis of a government's perceived effectiveness, or becomes a mere façade for political decision-making.

Finally, avoiding that regulation becomes a mere façade also requires an acknowledgment of the limits of regulation. Not all of the questions that development organizations encounter when seeking to engage in fragile states can be resolved on the basis of clear rules. Where regulation is nonetheless sought, decision-makers need to be open about the often inherently political nature of the questions faced when dealing with fragile states – e.g. concerning the recognition of governments or the identification of non-state actors to engage with – rather than making that the political nature could be neutralized using regulation. This is true for even the most technical international development organizations, which are not value-neutral and do respond to political and other agendas defined by their member states.

character of administrative law, see CHRISTIAN TIETJE, 'Comment on the Contributions by Jochen von Bernstorff and by Maja Smrkolj', in Armin von Bogdandy, et al. (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010), 817-818.

Conclusion

Of the 1.5 billion people living in fragile countries, many may not feel like living in a state at all. International law, however, upholds the legal status of states even if the government is barely able to exercise effective authority, and provide basic services to its people. The reasons for maintaining this fictional façade are compelling. Yet it leads to a number of problems in the practice of international cooperation, where international organizations, for instance, expect governments to assume quite substantial roles and responsibilities. For the citizens of fragile states, the lack of a *de jure* and *de facto* ‘effective government’ can ultimately impede their ability to receive international financial and technical assistance.

Since I started writing this thesis, some countries managed to transition out of fragility, while others have joined the list of fragile states.¹⁰⁴⁵ Considered as relatively stable up to 2011, Libya threatens to disintegrate.¹⁰⁴⁶ Similarly, Syria’s civil war has brought the country close to becoming “another Somalia” and destabilizes the entire region.¹⁰⁴⁷ The world’s youngest state South Sudan has descended into civil war two years after independence – not least because development organizations have failed to adequately acknowledge and address deep-seated problems of political reconciliation.¹⁰⁴⁸ And, despite vast amounts of ODA, Afghanistan’s future remains uncertain as Ashraf Ghani takes over the Presidency.¹⁰⁴⁹

¹⁰⁴⁵ Countries and territories that were on the World Bank’s list of fragile states (*supra* note 1) in 2012, but no longer in 2015, are: Angola, Republic of Congo, Georgia, Guinea, Nepal, Timor-Leste, and Western Sahara. Countries that were not on the 2012 list, but appear on the 2015 list, are: Libya, Madagascar, Mali, Syria and Tuvalu.

¹⁰⁴⁶ E.g. JON LEE ANDERSON, ‘Can Libya be Saved?’, in *The New Yorker* (August 7, 2013); or HISHAM MATAR, ‘The killing of Abdelsalam al-Mismari, and the triumph of fear in Libya’, in *The Guardian* (July 30, 2013) a Libyan author stating that “Under Gaddafi we were afraid of the state; now its weakness imperils all we have achieved”.

¹⁰⁴⁷ ANONYMOUS, Ex UN envoy predicts Syria will be ‘failed state’, BBC News (June 8, 2014), at <http://www.bbc.com/news/world-middle-east-27754732>

¹⁰⁴⁸ See MARK TRAN, ‘South Sudan failed by misjudgment of international community, says UN chief’, in *The Guardian* (January 22, 2014); and SARA PANTULIANO, Donor-Driven Technical Fixes Failed South Sudan: It’s Time to Get Political, December 9, 2014 (Think Africa Press), at <http://thinkafricapress.com/south-sudan/donor-driven-technical-fixes-failed-time-put-politics-heart-nation-building-project-kiir-machar-garang>. Notably, South Sudan was a test case for new and differentiated approaches to development cooperation with fragile states: three months prior to descending into civil war, the country was in the process of developing a New Deal Compact. On the New Deal, see *supra* chapter II.3 a).

¹⁰⁴⁹ President Ghani is also co-author of the book “Fixing Failed States” (*supra* note 124). On the results of over a decade of international state-building efforts in Afghanistan, leaving the country with political instability, a fragile economy, and highly dependent on foreign aid, see, for instance, JONATHAN STEELE, ‘The West’s Legacy in Afghanistan: So Much for so Little’, in *The Guardian*

Against this background, I do not naively suggest that the manifold challenges of aiding fragile states lend itself to an easy or perfect solution, nor that adapting the legal and policy frameworks of international organizations is all that it takes. I do, however, suggest that the legal response of international organizations can and should be analyzed in more detail – and that such an analysis can ultimately guide proposals to make their dealings with fragile states more transparent and less arbitrary.

In this thesis, I have shown that fragile states are perhaps a factual phenomenon beyond law, but how international development organizations have addressed the challenges of engaging with fragile states is of legal significance. I have developed an approach for legal scholars to engage with the phenomenon of fragile states, which requires scrutinizing what position fragile states are accorded by other legal subjects, considering formal and informal legal instruments. Focusing on development cooperation, I have analyzed how, and to what effect various international organizations have adopted or modified rules of their legal and policy frameworks to engage with fragile states, identified emerging patterns, and discussed the potentials and perils of formalizing a differentiated approach to fragile states.

In this conclusion, I summarize my key findings (1.), discuss their broader relevance, and identify questions for further research (2.).

1. Summary of Key Findings

Fragile states are a phenomenon characterized by the discrepancy between the formal legal status, and the weak factual capacity of state institutions. From an empirical-sociological perspective, it is neither new, nor surprising that different countries have more or less effective governments, or governance. Why a group of countries with weak institutional capacity and poor governance suddenly received so much attention from the international community is a multifaceted question – and the notion of fragile states must be understood both as an empirical phenomenon, as well as a construct of Western political and academic discourse. From a legal perspective, in turn, variations in a government's effectiveness, whether real or apparent, retreat behind the legal status of the state and principle of sovereign equality. Fragile states are thus deliberately no legal concept, and – to paraphrase Koskeniemi – the

(January 15, 2014); or INTERNATIONAL CRISIS GROUP, Asia Report No 210, '*Aid and Conflict in Afghanistan*' (August 4, 2011).

wonderfully artificial doctrine of juridical statehood also explains why international legal scholars have mostly neglected the discourse on state fragility.¹⁰⁵⁰

Acknowledging the analytical and normative shortcomings of the notion, as well as the difficulties of describing state fragility in terms of legal doctrine, legal scholars should nonetheless pay more attention to its consequences. International law rests on the formal premise that all states have ‘effective government’, and are in principle capable of exercising rights and obligations under international law. States that lack the actual capacity to perform even most basic functions accordingly pose a fundamental problem to the functioning and effectiveness of the international legal order. How this problem comes up and how it is addressed in the practice of international cooperation are thus questions of great relevance.

A fruitful field for analysis is development cooperation, where the characteristic discrepancy between formal legal status, and weak factual capacity of state institutions has often complicated, delayed, and even prevented international organizations from engaging in countries with the most urgent needs. Development cooperation traditionally follows a state-centric paradigm, and international development organizations are in fact required by their legal and policy frameworks to deal with recipient states through the national government. National governments are expected to have the capacity to express consent, negotiate and ratify agreements, and to fulfill a number of requirements in the development process. The state-centric paradigm of development cooperation thus leads to a peculiar paradox. Development organizations operate on the premise that all states have effective governments, *de jure* and *de facto*, while they are naturally concerned with strengthening government effectiveness in developing countries.

In response to the ensuing challenges of engaging with countries that have very weak or no government, development organizations have begun to revisit the basic premises and rules on which they operate. A preliminary overview of the policy-making, standard-setting, and operational reform activities of a range of international development organizations suffices to show that they forge a common understanding and approach to fragile states.

To grasp the legal significance and consequences of such activities, it is important to understand that how international development organizations transfer ODA to

¹⁰⁵⁰ *Supra* note 11.

recipient states is generally governed by rules and procedures. The relevant rules are mostly contained in the legal and policy frameworks of international organizations – statutes, and more or less formalized, secondary rules – which guide how organizations negotiate, plan, and implement development projects in collaboration with the governments of recipient countries. Particularly internal, secondary rules are potent instruments in steering the conduct of development organizations, and regularly assume external effects for recipient countries through formulating the terms and conditions, including procedural rights, for the transfer of ODA. All organizations engaged in development cooperation are normally bound by the objective of fostering development, mostly procedural standards of effectiveness, and importantly, the protection of recipient sovereignty and ownership.

How, and to what effect, have development organizations adapted their legal and policy frameworks to engage with fragile states? The analysis of the World Bank, my central case study, shows that over the last two decades, the organization has used interpretation and internal-rule making to become engaged in the contexts of humanitarian emergencies, conflict-affected, and fragile states. The Bank has adopted internal rules stating that in the absence of a government to express consent, the organization can engage upon requests of the international community instead; and in non-member countries or territories, it can engage if deemed beneficial for the membership as a whole. Both are situations that bring the World Bank exceedingly close to the limits of the political prohibition clause, but which are allegedly “consistent with the Bank’s will to act as a good and responsible international citizen.”¹⁰⁵¹ In addition, acknowledging that the requirements set out in conventional policies and procedures for project lending and budget assistance can be overly demanding for fragile states, the organization has modified the relevant internal rules to permit differential treatment of governments that currently lack the capacity to comply.

Overall, the World Bank has shown a preference for consolidating and formalizing a differentiated approach to fragile states, wherein the official classification of fragile states that the Bank conducts on the basis of the CPIA assumes only a minor role. Yet, I also find that the World Bank’s response to the challenges of engaging with fragile states remains far from systematic. It often relies

¹⁰⁵¹ *Supra* note 685.

on rules that are formulated in ambiguous terms and leave considerable discretion to decision-makers – staff, or the Executive Directors. Whether the Bank seeks to systematically adapt to the special circumstances and needs of fragile states, or rather to evade certain mandate constraints to engage in countries that are of particular concern to its major shareholders, is not always clear.

A more nuanced picture of how international development organizations adapt rules to engage with fragile states comes from comparing the regulatory approach of the World Bank with that of the AfDB, ADB, and EU. With similar legal frameworks and mandates, the AfDB and the ADB *prima facie* face similar constraints as the World Bank when seeking to engage in countries with weak or no government. Like the World Bank, both regional development banks have therefore sought ways of providing assistance to countries without necessarily involving the government, and of making sure that standard policies and procedures do not impede flexible and speedy operations in countries with weak capacity. Important nuances nevertheless emerge when considering to what extent and how AfDB and ADB have modified rules of their legal framework, or preferred a more *ad hoc* response. With the establishment of the Fragile States Facility, for instance, the AfDB has created a quasi self-contained, differentiated regime that comprehensively governs the use of special resources for operations in fragile states. In contrast, the ADB has mostly refrained from formalizing specific exceptions for fragile or conflict-affected states in its legal framework, and rather waived existing requirements if necessary.

The EU, in turn, faces somewhat different constraints when seeking to engage with fragile states. This is mostly owed to its broader, political mandate, and the fact that differentiation (based on country circumstances or needs) and participation (of non-state actors) already constitute fundamental principles of the legal framework for EU development cooperation. Perhaps surprisingly, I nonetheless find that how, and particularly to what effect the EU has adapted its legal and policy framework to engage in countries with no or very weak government shows notable parallels with the MDBs' approach. This concerns the use of differential treatment, but also the introduction of provisions that permit bypassing national governments if deemed ineffective – or illegitimate, as measured by the EU's political standards.

The comparison of the World Bank with two similar and one very different organization provides a basis for reflecting on the factors that account for the similarities and differences in their respective approach to fragile states. Apart from

the question what constraints the existing legal framework poses in the first place, other factors – particular conceptions of state fragility, institutional culture, membership structure, and the interests of influential member states – equally shape to what extent and how international organizations decide to adapt their legal and policy frameworks.

Further, the comparison provides a basis for identifying broader patterns in how different development organizations have responded to the challenges of engaging with fragile states through legal and policy reforms. I find that state-building, i.e. establishing, reforming, or strengthening state institutions, gains in importance as a central paradigm and objective of development cooperation in fragile states. More importantly, state-building also constitutes a regulatory theme, since it captures the underlying motive of how development organizations modify their legal and policy frameworks to engage with fragile states. In essence, development organizations have adapted rules to acknowledge better the capacity constraints of state institutions in the short term – while making sure that their capacity is strengthened in the long term. Accordingly, all organizations I analyzed have introduced greater differentiation and flexibility in the rules that govern the transfer of ODA, and created substitutional arrangements that may limit the ownership of national governments. The lowering of requirements in the short term is usually combined with implementation assistance and capacity-building support to the government, however, and substitutional arrangements are limited in time.

Assessing the potential and perils involved where international development organizations formalize a differentiated approach to fragile states through legal and policy reforms requires consideration of a number of arguments – arguments that speak for and against adapting existing rules, and more generally, for and against using rules to regulate the conduct of development organizations. For instance, adapting existing rules to take into account the limited capacity of fragile states is a matter of equity and fairness, and can enhance the likelihood that the objectives of regulation are actually achieved. Yet, it can also mean that fiduciary, environmental, and social standards are discarded to facilitate engagement not necessarily in countries with the most urgent needs, but in those of particular interest to the donor community. Further, the adoption of formal rules to guide an organization's response to situations where no national government can be identified *prima facie* comes with the promise of making operational decision-making more transparent and consistent.

Regulation, however, generally reduces flexibility for decisions to be tailored to the specific circumstances of each case.

The current approach of the World Bank, the AfDB, the ADB, and the EU provides evidence of both the potentials and perils of regulation – and the value of formalizing a differentiated approach naturally depends on the content and design of the relevant rules, as well as the rule-making process. A number of measures could reduce the likelihood that rules used to formalize a differentiated approach to fragile states become a mere façade for political, or rather politicized decision-making. In essence, rules must be formulated in a way that provides a minimum level of clarity, and discretionary powers should be counterbalanced with procedural requirements that ensure the transparency and rationality of decision-making, and allow for review and contestation.

2. Broader Relevance and Outlook

The discrepancy between juridical statehood and empirical statehood challenges the functioning and effectiveness of the international legal order in general, and poses concrete problems to all those that operate on its premises and within its confines. International law is built on the assumption that all states have a functioning, effective government that can exercise rights and obligations. In all areas of international cooperation involving states, the government is the sole entity that can formally represent and legally commit the country. And yet our knowledge of how the ensuing problems of dealing with states that have no or only very weak governments are addressed in the practice of international cooperation is still limited.¹⁰⁵² How do other legal subjects engage with governments that exercise no real authority? How are legal rules adapted to accommodate the severe limitation of government effectiveness? And what are the consequences? As a first step towards addressing such far-reaching questions, this thesis examines the practice of international organizations in the field of development cooperation. The focus on international development organizations makes for a particularly relevant and rewarding analysis, for a number of reasons that I outline in the introduction. In the following, I discuss the broader relevance of my

¹⁰⁵² As noted before, some legal scholars have analyzed the consequences of a complete breakdown of effective government under international law, but particularly studies concerned with limitations of government effectiveness that fall short of a complete breakdown are largely missing. See *supra* note 9.

approach and findings beyond the field of development cooperation, and identify questions for further research.

First of all, the approach of this thesis is as relevant as the question what state fragility means for the ability of international organizations to fulfill their objectives and functions. Development cooperation is certainly not the only field where interactions between international organizations and states, or among states, are based on the premise that the states involved have ‘effective government’. Quite the contrary, it may appear paradoxical that even an area of international cooperation that is largely concerned with enhancing the capacity of state institutions in developing countries also hinges on the existence of states with capable institutions in the first place.¹⁰⁵³ The problems that arise when the ‘effective government’ premise is not met become particularly obvious when considering the interaction of international organizations with their member states. Member states are not only required to have a government with the capacity to represent the country in the organization’s bodies and proceedings.¹⁰⁵⁴ They need a government with the factual capacity to exercise the rights and obligations that come with membership in the organization, comply with legal obligations arising from treaties concluded with the organizations, and fulfill other regulatory requirements set by the organization, legally binding or not. This holds true even if what level and what types of capacity international organizations require from their member states or the states they engage with varies significantly from one organization to another.¹⁰⁵⁵

To what extent dealing with fragile states poses challenges for the mandated objectives and ordinary functions of international organizations – or *vice versa*¹⁰⁵⁶ –

¹⁰⁵³ On this paradox, see *supra* chapter II.2 a).

¹⁰⁵⁴ Particularly the question who gets to represent a member state in the organization’s bodies and proceedings has been addressed by legal scholars with regards to situations where there is no government in power (e.g. GEIB, *Failed States. Die normative Erfassung gescheiterter Staaten*, pp. 143-150), or in situations of doubt, e.g. after state succession or unconstitutional changes of government (e.g. KONRAD G. BÜHLER, *State Succession and Membership in International Organizations: Legal Theories Versus Political Pragmatism* (Kluwer Law International, 2001)).

¹⁰⁵⁵ Probably the highest level of capacity is required from EU member states to observe and implement EU law – and even EU member states may suffer from “systematic deficiencies” concerning their ability to guarantee the rule of law. See IOANNIDIS & VON BOGDANDY, ‘Systemic Deficiency in the Rule of Law: What it is, What has been done, What can be done’, examining what the widespread and entrenched inability of some member states to guarantee the rule of law, e.g. due to endemic corruption, weak institutional capacities, or insufficient resources, means for the EU legal order.

¹⁰⁵⁶ The question could also be asked the other way around: to what extent does dealing with international organizations, and meeting the regulatory requirements set by international organizations, put a further strain on the scarce capacity and resources of fragile states. See KINGSBURY & DAVIS, ‘Obligation Overload: Adjusting the Obligations of Fragile or Failed States’, considering the perverse

has, however, barely been addressed systematically in legal scholarship.¹⁰⁵⁷ Nor do we know much about how different organizations respond to such challenges, either *ad hoc* or by modifying their legal and policy frameworks. For instance, some organizations engaged in humanitarian assistance equally require a formal government request to become active (e.g. the United Nations Office for the Coordination of Humanitarian Affairs, OCHA), whereas others can also provide assistance to the population at the request of the UN Secretary General (namely, the World Food Programme, WFP).¹⁰⁵⁸ How humanitarian organizations are thus more or less attuned to dealing with fragile states is a question of great significance, considering that they mostly operate in fragile or conflict-affected states.¹⁰⁵⁹ In turn, other international organizations and policy fields are not primarily concerned with providing technical and financial assistance to the most needy countries, but have still developed legal approaches that could help dealing with the limited institutional and administrative capacity of certain countries to exercise rights and obligations. Cases

effects of overly demanding requirements that lead to fragile state governments being unable to give priority to things that are truly important for the country. Notably, the authors refer to the accumulated effects of (non-pecuniary) obligations imposed not just by one international organization, but by all kinds of ‘global governance institutions’. Further, they highlight that affirmative obligations as opposed to negative obligations that only require states to abstain from doing something are more likely to pose problems for fragile states, just as obligations that come with procedural requirements (e.g. reporting) are more burdensome than obligations of result.

On the increasing level of regulatory requirements that fall on each state in the international system, see also *supra* chapter I.4.

¹⁰⁵⁷ The question has perhaps been raised in abstract and concerning situations where no government exists, but it has rarely been addressed in detail, e.g. for individual organizations. A notable exception is Chiara Giorgetti, who analyzes how some international organizations have sought to respond to crisis situations involving governments unable to perform certain obligations – though again with a focus mostly on Somalia, i.e. the complete breakdown and absence of government. See GIORGETTI, *A Principled Approach to State Failure. International Community Actions in Emergency Situations*, in particular chapters 5, 6 and 7. The question what level of actual capacity is required from states to participate in the UN was discussed at the organizations in the 1960s and 1970s, when a number of small-island states (“mini-states”) with very limited human and economic resources were seeking membership. See MICHAEL GUNTER, ‘The Problem of Ministate Membership in the United Nations System: Recent Attempts Towards a Solution’, 12 *Columbia Journal of Transnational Law*, 464 (1973).

¹⁰⁵⁸ See GIORGETTI, *A Principled Approach to State Failure. International Community Actions in Emergency Situations*, pp. 157-158, referring to the Guiding Principle 3 and 4 of the UN General Assembly Resolution 46/182 of 19 December 1991, which established OCHA (UN Doc. A/RES/46/182); and Article XI of the General Regulations, the legal framework of the WFP. In addition, based on Article X (2), bilateral donors, UN agencies, and NGOs “may request WFP services for operations which are consistent with the purposes of WFP”. On the differences between humanitarian and development aid concerning the role of the state, see also *supra* note 886.

¹⁰⁵⁹ As I note in *supra* chapter II.3 a), with fragile states constituting environments where humanitarian, development, and security actors operate alongside each other, the Fragile States Principles can be seen as a synthesis approach between humanitarian principles (e.g. do no harm), and principles of development cooperation (e.g. focus on building the state’s long-term capacity). For an interesting reflection on the challenges that state fragility poses, for instance, to the international refugee regime, see also ALEXANDER BETTS, ‘State Fragility, Refugee Status and ‘Survival Migration’’, 43 *Forced Migration Review*, 4 (May 2013).

in point are the WTO and the WTO agreements, wherein a number of provisions accord developing countries special and differential treatment.¹⁰⁶⁰

Even if it turns out that international organizations have nowhere sought such a comprehensive response to the challenges of engaging with fragile states as in the field of development cooperation, their response could serve as a model for other organizations.¹⁰⁶¹ Particularly organizations that also engage with fragile states on a regular basis, also need governments to have the legal capacity to conclude agreements and the factual capacity to fulfill a number of regulatory requirements – and importantly, also have an interest in engaging with states where these conditions are not met – may face similar challenges as development organizations, and consider a similar response. The regulatory approaches and techniques I identify provide a reference point: for instance, using differentiated and more flexible requirements, shifting from *ex ante* requirements to *ex post* controls, or offering implementation assistance combined with capacity-building. The practice of development organizations also provides negative examples, however, e.g. of rules that leave unfettered discretionary powers and make decision-making concerning fragile states appear arbitrary and politically selective. Ultimately, formalizing a differentiated approach to fragile states always comes with potentials and perils, which should be carefully considered and weighed.

Speaking of the potentials and perils of formalizing a differentiated approach, my findings have also greater relevance in corroborating that the internal rule-making activities of international organizations still deserve more attention from legal scholarship.¹⁰⁶² For many international organizations, internal rules are of crucial

¹⁰⁶⁰ At the WTO, special and differential treatment consists, for instance, in the granting of longer time periods for implementation, but also technical assistance to help developing countries build the infrastructure to undertake WTO work, handle disputes, and implement technical standards. Special attention is accorded to LDCs. On the concept of differential treatment and its use in the WTO and in many environmental treaty regimes, see *supra* note 946; and with further examples of treaty regimes that to some extent acknowledge states' different implementation capacities (e.g. in the area of money-laundering and anti-corruption), OETER, 'Regieren im 21. Jahrhundert: Staatlichkeit und internationales System', 80-81.

¹⁰⁶¹ There are a number of reasons why the phenomenon of fragile states has gained so much traction in the field of development cooperation, and not all of them have to do with the underlying premises of its governing law, which I outline in *supra* chapter II.2. The high saliency of the topic, for instance, has to do with the fact that tackling state fragility is increasingly seen as a global public good (*supra* note 257). Moreover, a broad coalition of interest – multilateral donors, bilateral donors, and recipient states – apparently supports a comprehensive, systematic, and increasingly formalized response. See, for instance, *supra* note 140, on the advantages for developing countries that may come from being labelled as 'fragile state'.

¹⁰⁶² See *supra* chapter III.1 in general, and IV.1 a) on the internal rules of the World Bank.

significance in guiding their conduct, and though often developed in relatively informal, unilateral processes, can assume significant external effects on the countries they engage with. One aspect that deserves particular attention is the relationship between more or less formalized, internal rules of international organizations, and international law's traditional sources.¹⁰⁶³ Some internal rules have certainly no bearing on international treaty or customary law, even if they have significant internal and external effects. Examples are the Operational Policies that regulate the World Bank's financing instruments.¹⁰⁶⁴ Other internal rules, however, are used to codify interpretations of the founding treaties or emerging organizational practices, and thus affect existing treaty law – for example, the World Bank's OP 2.30 and 7.30.¹⁰⁶⁵ To what extent do the internal rules of international organizations also contribute to the further development of international law, in areas that are important, yet under-developed?¹⁰⁶⁶ Stating that the World Bank or other organizations have contributed to the transformation of the legal doctrine of statehood or principle of sovereignty appears a bit too far-fetched. Yet, their rule-making concerning fragile states certainly reflects the evolving understanding of sovereignty in the 21st century, which manifests itself in the internal legal order and practice of the organizations.¹⁰⁶⁷

The legitimacy concerns raised by these observations reverberate in a growing body of legal scholarship concerned with the governance activities of international organizations.¹⁰⁶⁸ In this context, the contribution of this thesis lies in directing attention to a particular constellation – international organizations and fragile states. It is a constellation worth analyzing further from the perspective of legal approaches

¹⁰⁶³ I point attention to the diverging views concerning the relation between internal secondary rules and the traditional sources of international law established in Art. 38 ICJ-Statute in the introduction, and in *supra* note 54.

¹⁰⁶⁴ For a detailed analysis of OP 10.00, OP 8.60, and OP 9.00, see *supra* chapter IV.4.

¹⁰⁶⁵ In this context, the World Bank's practice of using internal rules as a basis for informal, implied interpretations appears particularly noteworthy, and problematic. See *supra* chapter IV.1 a); and for a detailed analysis of OP 2.30 and OP 7.30, *supra* chapter IV.3.

¹⁰⁶⁶ BRADLOW & NAUDÉ FOURIE, 'The Operational Policies of the World Bank and the International Finance Corporation. Creating Law-Making and Law-Governed Institutions?', 7, arguing that institutions can "influence the normative development of international law" when they "are interpreting and applying international law in areas that are particularly under-developed with respect to specific cases or factual situations". For further references, see *supra* note 439.

¹⁰⁶⁷ See also WEILER, 'Editorial. Differentiated Statehood? 'Pre-States'? Palestine@the UN', 5, reminding us that "in the actual praxis of international life, functionally things look interestingly different, reminiscent perhaps of the tension between the formal existence of a right and its exercise. Statehood, grant me, is not that simple a monolithic concept."

¹⁰⁶⁸ See *supra* chapter III.1, on the contribution of the GAL and IPA approaches to grasping the potential effects of a variety of normative outputs of international organizations; and *supra* chapter VI.3 on proposals to address the ensuing legitimacy concerns.

that seek to conceptualize and importantly, to confine the governance activities of international organizations. This would entail asking more normative questions than this thesis does – an important exercise, given that the legal frameworks of many organizations provide relatively few, effective constraints on their rule-making activities.¹⁰⁶⁹

At the same time, considering the rules and processes through which international organizations engage with fragile states draws attention to a number of conceptual and theoretical questions that have yet to be addressed. For instance, how do we factor in that the determining effects of a formally non-binding rule on some states may be much more substantial than for others, depending on the extent to which states are able to resist the rule's impetus?¹⁰⁷⁰ Further, how should international organizations legitimize their activities when dealing with states that have no government, or one with virtually no capacity to maintain public order and represent the population internationally?¹⁰⁷¹ Domestic public authority may appear weak in some states, but international organizations are still far from constituting effective and legitimate public authorities themselves.

Finally, I hope that this thesis inspires further research into the empirical phenomenon of fragile states from the perspective of international law. We can acknowledge the conceptual ambiguity and normative bias of a notion like fragile states, and still ask for the role that states with no or only very weak governments are accorded by different actors, in different legal regimes. In fact, considering the politics invariably involved when it comes to describing and dealing with fragile states, this kind of informed but cautious analysis is highly relevant. The fundamental problem that state fragility poses to the international legal order will certainly not go away. Quite the contrary, it will become more acute with the increasing intensity of international cooperation and regulation, with states no longer assuming the sole, but

¹⁰⁶⁹ See *supra* chapter III.1 and the references in *supra* note 433.

¹⁰⁷⁰ See, for instance, RIEGNER, 'Measuring the Good Governance State: A Legal Reconstruction of the World Bank's "Country Policy and Institutional Assessment"', 10, proposing to amend the current threshold approach that the IPA approach uses to determine the legal significance of non-binding acts (*supra* note 444), namely to "take into account legally defined situations of structural asymmetries or dependencies in which a legally circumscribed category of subjects can be presumed to be particularly receptive to authoritative forms of governance"; or DANN, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, 510.

¹⁰⁷¹ Some inspiration for this question can be sought in GOLDMANN, *Internationale Öffentliche Gewalt. Handlungsformen internationaler Institutionen im Zeitalter der Globalisierung*, 573; or LADWIG & RUDOLF, 'International Legal and Moral Standards of Good Governance in Fragile States', discussing the "metaproblems of legitimacy" in fragile states.

still the most important role as law-makers and primary agents of implementation. Statehood will continue to matter, as will state fragility. And for international organizations to navigate, and ultimately to help reduce the uncomfortable gap between legal status and weak government effectiveness, more practical legal guidance is needed.

Bibliography

- Abbott, Kenneth W. and Snidal, Duncan, 'Hard and Soft Law in International Governance', 54:3 *International Organization*, 421 (2000).
- Acemoglu, Daron and Robinson, James, *Why Nations Fail. The Origins of Power, Prosperity, and Poverty* (Crown Business, 2012).
- African Development Bank, '*Addressing Fragility and Building Resilience in Africa: The African Development Bank Group Strategy 2014–2019*' (June 2014).
- African Development Bank, '*Somalia Country Brief 2013-2015*' (March 2013).
- African Development Bank, '*South Sudan Interim Country Strategy Paper 2012-2014*' (October 2012).
- African Development Fund, '*Strategy for Enhanced Engagement in Fragile States*' (2008).
- Ahlborn, Christiane, Amsterdam Center for International Law (ACIL) Research Paper No 2011-03 (SHARES Series), '*The Rules of International Organizations and the Law of International Responsibility*' (2011).
- Ahmed, Dawood I., 'Defending Weak States Against the “Unwilling or Unable” Doctrine of Self-Defense', 9 *Journal of International Law and International Relations*, 1 (2013).
- Ahrne, Göhran and Brunsson, Nils, 'Soft Regulation from an Organizational Perspective', in Ulrika Mörtz (ed), *Soft Law in Governance and Regulation. An Interdisciplinary Analysis* (Edward Elgar, 2004).
- Akpınarlı, Neyire, *The Fragility of the 'Failed State' Paradigm. A Different International Law Perception of the Absence of Effective Government*, (Nijhoff, 2010).
- Alvarez José, E., 'Constitutional Interpretation in International Organizations', in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations* (New York University Press, 2001).
- Alvarez, José E., *International Organizations as Law-Makers*, (Oxford University Press, 2005).
- Anderson, Jon Lee, 'Can Libya be Saved?', in *The New Yorker*, (August 7, 2013).
- Anderson, Michael and Torres, Magüi Moreno, UK Department for International Development, PDRE Working Paper 1, '*Fragile States: Defining Difficult Environments for Poverty Reduction*' (August 2004).

- Anghie, Antony, *Imperialism, Sovereignty, and the Making of International Law*, (Cambridge University Press, 2005).
- Anonymous, Ex UN envoy predicts Syria will be 'failed state', BBC News (June 8, 2014), at <http://www.bbc.com/news/world-middle-east-27754732>.
- Arts, Karin, 'ACP-EU Relations in a New Era: The Cotonou Agreement', 40 *Common Market Law Review*, 95 (2003).
- Asian Development Bank, '*Working Differently in Fragile and Conflict-affected Situations - The ADB Experience: A Staff Handbook*' (2012).
- Asian Development Bank, '*Achieving Development Effectiveness in Weakly Performing Countries. The Asian Development Bank's Approach to Engaging with Weakly Performing Countries*' (April 2007).
- Asian Development Bank, '*Strategy 2020. The Long-term Strategic Framework of the Asian Development Bank 2008-2020*' (April 2008).
- Asian Development Bank, '*Annual Report on the 2012 Country Performance Assessment Exercise*' (April 2013).
- Asian Development Bank, '*Operational Plan for Enhancing ADB's Effectiveness in Fragile and Conflict-Affected Situations*' (April 2013).
- Baimu, Evarist, South Sudan: A New State is Born, The World Bank - Law, Justice and Development (September 2011), at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:22994807~pagePK:210058~piPK:210062~theSitePK:445634~isCURL:Y~isCURL:Y,00.html>.
- Bain, William, 'For Love of Order and Abstract Nouns: International Administration and the Discourse of Ability', 3:2 *Journal of Intervention and State-Building*, 143 (2009).
- Bantekas, Ilias, *Trust Funds under International Law. Trustee Obligations of the United Nations and International Development Banks*, (TMC Asser Press, 2009).
- Baranyi, Stephen and Desrosiers, Marie-Eve, 'Development Cooperation in Fragile States: Filling or Perpetuating Gaps?', 12:5 *Conflict, Security & Development* 443 (2012).
- Barber, Rebecca, 'The Responsibility to Protect the Survivors of Natural Disaster: Cyclone Nargis, a Case Study', 14:1 *Journal of Conflict & Security Law*, 3 (2009).
- Bartels, Lorand, *Human Rights Conditionality in the EU's International Agreements*, (Oxford University Press, 2005).
- Bartelt, Sandra, 'The Institutional Interplay Regarding the New Architecture for the EC's External Assistance', 14:5 *European Law Journal*, 655 (2008).

Bartelt, Sandra, 'The Legislative Architecture of EU External Assistance and Development Cooperation', in Sandra Bartelt (ed), *Entwicklungszusammenarbeit im Recht der Europäischen Union* (Nomos, 2008).

Bartl, Jürgen, *Die humanitäre Intervention durch den Sicherheitsrat der Vereinten Nationen im "failed state". Das Beispiel Somalia*, (Lang, 1999).

Benzing, Markus, 'Secondary Law', in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, March 2007).

Bertoli, Simone and Ticci, Elisa, 'A Fragile Guideline to Development Assistance', 30:2 *Development Policy Review*, 211 (2012).

Bethke, Felix, 'Zuverlässig invalide – Indizes zur Messung fragiler Staatlichkeit', 6 *Zeitschrift für vergleichende Politikwissenschaft*, 19 (2012).

Betts, Alexander, 'State Fragility, Refugee Status and 'Survival Migration'', 43 *Forced Migration Review*, 4 (May 2013).

Bhuta, Nehal, 'Governmentalizing Sovereignty: Indexes of State Fragility and the Calculability of Political Order', in Kevin E. Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry (eds), *Governance by Indicators. Global Power Through Quantification and Rankings* (Oxford University Press, 2012).

Binder, Christina, 'Stability and Change in Times of Fragmentation: The Limits of Pacta Sunt Servanda Revisited', 25:4 *Leiden Journal of International Law*, 909 (2012).

Bluntschli, Johann-Caspar, *The Theory of the State*, (Clarendon, 1985).

Boas, Morten and McNeill, Desmond (eds), *Global Institutions and Development. Framing the World?*, (Routledge, 2004).

Boisson de Chazournes, Laurence, 'Policy Guidance and Compliance: The World Bank's Operational Standards', in Dinah Shelton (ed), *Commitment and Compliance* (Oxford University Press, 2000).

Boisson de Chazournes, Laurence, 'Partnerships, Emulation, and Coordination: Toward the Emergence of a Droit Commun in the Field of Development Finance', in Hassane Cissé, Daniel D. Bradlow and Benedict Kingsbury (eds), *The World Bank Legal Review. Volume 3. International Financial Institutions and Global Legal Governance* (The World Bank, 2012).

Boon, Kristen E., '"Open for Business": International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law', 9 *New York University Journal of International Law & Politics*, 513 (2007).

Boyle, Alan E. and Chinkin, Christine M., *The Making of International Law*, (Oxford University Press, 2007).

Bradley, Andrew, European Centre for Development Policy Management, Discussion Paper No. 64D, '*An ACP Perspective and Overview of Article 96 Cases*' (August 2005).

Bradlow, Daniel, 'International Law and the Operations of the International Financial Institutions', in Daniel Bradlow and David Hunter (eds), *International Financial Institutions and International Law* (Kluwer, 2010).

Bradlow, Daniel, 'The Reform of Governance of the IFIs: A Critical Assessment', in Hassane Cissé, Daniel Bradlow and Benedict Kingsbury (eds), *The World Bank Legal Review. Volume 3. International Financial Institutions and Global Legal Governance* (The World Bank, 2012).

Bradlow, Daniel D. and Hunter, David B. (eds), *International Financial Institutions and International Law*, (Kluwer, 2010).

Bradlow, Daniel and Naudé Fourie, Andria, 'The Operational Policies of the World Bank and the International Finance Corporation. Creating Law-Making and Law-Governed Institutions?': 10 *International Organizations Law Review*, 3 (2013).

Braml, Josef, Risse, Thomas and Sandschneider, Eberhard (eds), *Einsatz für den Frieden. Sicherheit und Entwicklung in Räumen begrenzter Staatlichkeit*, (Oldenbourg, 2010).

Broches, Aron, *Selected Essays. World Bank, ICSID, and Other Subjects of Public and Private International Law*, (Martinus Nijhoff, 1995).

Brooks, Rosa Ehrenreich, 'Failed States, or the State as Failure?', 72:4 *The University of Chicago Law Review*, 1159 (2005).

Brown, Bartram S., *The United States and the Politicization of the World Bank. Issues of International Law and Policy*, (Kegan Paul International, 1992).

Brownlie, Ian, *Principles of Public International Law*, 7th Edition, (Oxford University Press, 2008).

Buchanan, Allen E., *Justice, Legitimacy, and Self-determination. Moral Foundations for International Law*, (Oxford University Press, 2003).

Buchheit, Lee C. and Galati, G. Mitu, 'Odious Debts and Nation-Building: When the Incubus Departs', 60:2 *Maine Law Review*, 478 (2008).

Bühler, Konrad G., *State Succession and Membership in International Organizations: Legal Theories Versus Political Pragmatism*, (Kluwer Law International, 2001).

Buiter, Willem H., 'Country Ownership': A Term Whose Time has Gone', 17:4 *Development in Practice*, 647 (2007).

Burnside, C. and Dollar, D., 'Aid, Policies, and Growth', 90:4 *American Economic Review*, 847 (2000).

Call, Charles T., 'The Fallacy of the 'Failed State'', 29:8 *Third World Quarterly*, 1491 (2008).

Call, Charles T., 'Beyond the 'Failed State': Toward Conceptual Alternatives', 17:2 *European Journal of International Relations*, 303 (2010).

Cammack, Diana , McLeod, Dinah , Rocha Menocal, Alina and Christiansen, Karin Overseas Development Institute, , '*Donors and the 'Fragile States' Agenda: A Survey of Current Thinking and Practice. Report submitted to the Japan International Cooperation Agency*' (2006).

Caplan, Richard, *International Governance of War-torn Territories. Rule and Reconstruction*, (Oxford University Press, 2005).

Carbone, Sergio M. and Schiano di Pepe, Lorenzo, 'Fundamental Rights And Duties of States', in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, January 2009).

Carment, David, Samy, Yiagadeesen and Prest, Stewart, 'State Fragility and Implications for Aid Allocation: An Empirical Analysis', 25 *Conflict Management and Peace Science*, 349 (2008).

Cassese, Sabino, 'Is There a Global Administrative Law? ', in Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010).

Chandler, David, 'Great Power Responsibility and "Failed States": Strengthening Sovereignty?', in Julia Raue and Patrick Sutter (eds), *Facets and Practices of State-Buildung* (Martinus Nijhoff, 2009).

Chandy, Laurence, The Brookings Institution, Global Economy and Development Policy Paper 2011-12, '*Ten Years of Fragile States. What Have We Learned?*' (2011).

Chauvet, Lisa, Collier, Paul and Hoeffler, Anke, United Nations University WIDER Research Paper No. 2007/30, '*The Costs of Failing States and the Limits to Sovereignty*' (2007).

Chayes, Abram and Chayes, Antonia Handler, *The New Sovereignty. Compliance with International Regulatory Agreements*, (Harvard University Press, 1998).

Chesterman, Simon, 'An International Rule of Law?', 56 *American Journal of Comparative Law*, 331 (2008).

Chesterman, Simon, 'International Territorial Administration and the Limits of Law', 23:2 *Leiden Journal of International Law*, 437 (2010).

Chesterman, Simon, Ignatieff, Michael and Thakur, Ramesh (eds), *Making States Work: State Failure and the Crisis of Governance*, (United Nations University Press, 2005).

- Chimni, B. S., 'Third World Approaches to International Law. A Manifesto', *International Community Law Review*, 3 (2006).
- Chinkin, Christine M., 'The United Nations Decade for the Elimination of Poverty: What Role for International Law?', 54:1 *Current Legal Problems*, 553 (2001).
- Chopra, Jarat, 'The UN's Kingdom of East Timor', 42:3 *Survival*, 27 (2000).
- Chuter, David, 'Must Do Better: The African State, The African State, and the State of Africa', 62:2 *Studia Diplomatica*, 27 (2009).
- Ciorciari, John D., 'Prospective Enlargement of the Roles of the Bretton Woods Financial Institutions in International Peace Operations', 22:2 *Fordham International Law Journal*, 292 (1998).
- Cissé, Hassane, 'Should the Political Prohibition in Charters of International Financial Institutions be Revisited? The Case of the World Bank', in Hassane Cissé, Daniel D. Bradlow and Benedict Kingsbury (eds), *The World Bank Legal Review. Volume 3. International Financial Institutions and Global Legal Governance* (The World Bank, 2012).
- Clapham, Christopher, *Africa and the International System. The Politics of State Survival*, (Cambridge University Press, 1996).
- Clapham, Christopher, 'Degrees of Statehood', 24 *Review of International Studies*, 143 (1998).
- Clapham, Christopher, 'The Challenge to the State in a Globalized World', 33:5 *Development & Change*, 775 (2002).
- Cohen, Jean L., 'Whose Sovereignty? Empire Versus International Law', 18:3 *Ethics & International Affairs*, 1 (2004).
- Collier, Paul, *The Bottom Billion. Why the Poorest Countries are Failing and What Can Be Done About It*, (Oxford University Press, 2007).
- Collier, Paul and Hoeffler, Anke, *Coup Traps: Why does Africa have so many Coups D'état?*, (Oxford University Press, 2005).
- Cooper, Neil, 'Review Article: On the Crisis of the Liberal Peace', 7:4 *Conflict, Security & Development*, 605 (2007).
- Craven, Mathew, 'States and Recognition in International Law', in Malcolm D. Evans (ed), *International Law* (Oxford University Press, 2010).
- Crawford, James, *The Creation of States in International Law*, 2nd Edition, (Clarendon Press, 2007).

Crawford, James, 'State', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* January 2011).

Crawford, Young, *The African Colonial State in Comparative Perspective*, (Yale University Press, 1994).

Cullet, Philippe, 'Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations', 10:3 *European Journal of International Law*, 549 (1999).

Cullet, Philippe, *Differential Treatment in International Environmental Law*, (Ashgate, 2003).

Culperer, Roy, *Titans or Behemoths?*, The Multilateral Development Banks, Volume 5 (Lynne Rienner Publishers, 1997).

D'Aspremont, Jean, 'Post-conflict Administrations as Democracy-building Instruments', *Chicago Journal of International Law*, 1 (2008).

d'Aspremont, Jean, 'From a Pluralization of International Norm-making Processes to a Pluralization of the Concept of International Law', in Jan Wouters, Joost Pauwelyn and Ramses A. Wessel (eds), *Informal International Lawmaking* (Oxford University Press, 2012).

Daase, Cindy, 'Liberia's Governance and Economic Management Assistance Programme – A New Model of Shared Sovereignty?', 71 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 493 (2011).

Dann, Philipp, 'Grundfragen eines Entwicklungsverwaltungsrechts', in Christoph Möllers, Andreas Vosskuhle and Christian Walter (eds), *Internationales Verwaltungsrecht: Eine Analyse Anhand von Referenzgebieten* (Mohr Siebeck, 2007).

Dann, Philipp, *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, (Cambridge University Press, 2013).

Dann, Philipp and Sattelberger, Julia, 'Verrechtlichung in der Entwicklungszusammenarbeit: Zur normativen Verdichtung des Prinzips der Eigenverantwortung', in Aram Ziai (ed), *Im Westen nichts Neues? Stand und Perspektiven der Entwicklungstheorie* (Nomos, 2014).

Dann, Philipp and von Bernstorff, Jochen, Gesellschaft für Internationale Zusammenarbeit (GIZ) 'Reforming the World Bank's Safeguards. A Comparative Legal Analysis' (July 2013).

Dann, Philipp and von Engelhardt, Marie, 'Legal Approaches to Global Governance and Accountability: Informal Lawmaking, International Public Authority, and Global Administrative Law Compared', in Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012).

- Darrow, Mac and Arbour, Louise, 'The Pillar of Glass: Human Rights in the Development Organizations of the United Nations', 103:3 *American Journal of International Law* 446 (2009).
- Darrow, Mac and Tomas, Amparo, 'Power, Capture, and Conflict. A Call for Human Rights Accountability in Development Cooperation', 27 *Human Rights Quarterly*, 471 (2005).
- Davis, Kevin, 'Financing Development' as a Field of Practice, Study and Innovation', 168 *Acta Juridica*, 168 (2009).
- Davis, Kevin E., Kingsbury, Benedict and Engle Merry, Sally, 'Indicators as a Technology of Global Governance', 46:1 *Law & Society Review*, 71 (2012).
- Davis, Kevin and Mota Prado, Mariana, 'Law, Regulation, and Development', in Bruce Currie-Alder, Ravi Kanbur, Davis Malone and Rohinton Medhora (eds), *International Development. Ideas, Experience, and Prospects* (Oxford University Press, 2014).
- Debiel, Tobias, Klingebiel, Stephan, Mehler, Andreas and Schneckener, Ulrich, Development and Peace Foundation, Policy Paper 23, '*Between Ignorance and Intervention. Strategies and Dilemmas of External Actors in Fragile States*' (2005).
- Decker, Klaus, 'World Bank Rule-of-Law Assistance in Fragile States: Developments and Perspectives', in Amanda E. Perry (ed), *Law in the Pursuit of Development. Principles into Practice?* (Routledge, 2010).
- Deeks, Ashley S., "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense', 52:3 *Virginia Journal of International Law*, 483 (2012).
- Dekker, Ige F., 'Making Sense of Accountability in International Institutional Law. An Analysis of the Final Report of the ILA Committee on Accountability of International Organizations from a Conceptual Legal Perspective', 36:1 *Netherlands Yearbook of International Law*, 83 (2007).
- Department for International Development (DFID), '*Working Effectively in Conflict-affected and Fragile Situations. Summary Note*' (2010).
- Dolzer, Rudolf, 'Good Governance: Neues transnationales Leitbild der Staatlichkeit?', 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 535 (2004).
- Easterly, William, Levine, R and Roodmann, D., Center for Global Development. CGD Working Paper # 26, '*New Data, New Doubts: Revisiting "Aid, Policies, and Growth"*' (2003).
- ECDPM, European Centre for Development Policy Management, Discussion Paper No.134, '*Differentiation in ACP-EU Cooperation. Implications of the EU's Agenda for Change for the 11th EDF and Beyond*' (October 2012).

- Eckert, Amy, 'United Nations Peacekeeping in Collapsed States', 5 *Journal of International Law and Practice*, 273 (1996).
- Efraim, Athena Debiie, *Sovereign (In)Equality in International Organizations*, (Martinus Nijhoff, 2000).
- Ehret, Christopher, *The Civilizations of Africa: A History to 1800*, (University of Virginia Press, 2002).
- Einhorn, Jessica, 'The World Bank's Mission Creep', 80 *Foreign Affairs*, 22 (2001).
- Engberg-Pedersen, Lars, Andersen, Louise and Stepputat, Finn, Danish Institute for International Studies, DIIS Report 9, '*Fragile Situations. Current Debates and Central Dilemmas*' (2008).
- Englebert, Pierre, *State Legitimacy and Development in Africa*, (Lynne Rienner Publishers, 2000).
- Englebert, Pierre and Tull, Denis M., 'Postconflict Reconstruction in Africa Flawed Ideas about Failed States', 32:4 *International Security*, 106 (2008).
- English, E. Philip and Mule, Harris M., *The African Development Bank*, (Lynne Rienner Publishers, 1996).
- Eriksen, Stein Sundstol, 'State failure' in Theory and Practice: The Idea of the State and the Contradictions of State Formation', 37 *Review of International Studies*, 229 (2011).
- Ertman, Thomas (ed), *Birth of the Leviathan: Building States and Regimes in Medieval and Early Modern Europe* (Cambridge University Press, 1997).
- Esty, Daniel C., 'Good Governance at the Supranational Scale. Globalizing Administrative Law', 115 *The Yale Law Journal*, 1493 (2006).
- EU Directorate-General for External Policies, European Parliament, '*EU Development Cooperation in Fragile States: Challenges and Opportunities*' (April 2013).
- European Bank for Reconstruction and Development, '*Political Aspects of the Mandate of the European Bank for Reconstruction and Development*'.
- European Commission, '*2014 Annual Report on the European Union's Development and External Assistance Policies and Their Implementation in 2013*' (2014).
- European Commission and European University Institute, '*European Report on Development. Overcoming Fragility in Africa. Forging a New European Approach*' (2009).
- Evans, Peter, *Embedded Autonomy: States and Industrial Transformation*, (Princeton University Press, 1995).

- Evans, Peter, 'The Eclipse of the State? Reflections on Stateness in an Era of Globalization', 50:1 *World Politics*, 62 (1997).
- Faria, Fernanda and Sherriff, Andrew, European Centre for Development Policy Management, 'EU Policies to Address Fragility in Sub-Saharan Africa. European Report on Development Background Paper' (2009).
- Feichtner, Isabel, *The Law and Politics of the WTO Waiver. Stability and Flexibility in Public International Law*, (Cambridge University Press, 2012).
- Fischer, Martina and Schmelzle, Beatrix, Berghof Research Centre for Constructive Conflict Management, Dialogue Series 8, 'Building Peace in the Absence of States - Challenging the Discourse on State Failure' (2009).
- Fisher, Jonathan, 'When it Pays to be a 'Fragile State': Uganda's Use and Abuse of a Dubious Concept', 35:2 *Third World Quarterly*, 316 (2014).
- Focarelli, Carlo, 'The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine', 13 *Journal of Conflict & Security Law* 191 (2008).
- Folz, Rachel and Leonhardt, Manuela, Gesellschaft für Internationale Zusammenarbeit (GIZ), 'The Engagement of the International Development Association in Fragile States. Proposals for a Reform Agenda' (April 2012).
- Fox, Gregory, 'The Right to Political Participation in International Law', 17 *Yale Journal of International Law*, 539 (1992).
- Fox, Gregory H. and Roth, Brad R., 'Democracy and International Law', 27:3 *Review of International Studies*, 327 (2001).
- FriEnt, 'Report of the FriEnt-Workshop on "A New Deal for Fragile States. International Engagement after Busan"' (January 19, 2012).
- Frowein, Jochen, *Das de facto-Regime im Völkerrecht*, (Heymann, 1968).
- Frowein, Jochen, 'De Facto Regime', in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, March 2013).
- Fujita, Sanae, *The World Bank, Asian Development Bank and Human Rights. Developing Standards of Transparency, Participation and Accountability*, (Edward Elgar, 2013).
- Fukuyama, Francis, *State-Building. Governance and World Order in the 21st Century*, (Cornell University Press, 2004).
- Fukuyama, Francis (ed), *Nation-Building. Beyond Afghanistan and Iraq*, (Johns Hopkins University Press, 2006).

Furness, Markus, German Development Institute, Discussion Paper 5/2014, '*Let's Get Comprehensive. European Union Engagement in Fragile and Conflict-Affected Countries*' (2014).

Gal-Or, Noemi, 'Suspending Sovereignty: Reassessing the Interlocking of Occupation, Failed and Fragile State, Responsibility to Protect, and International Trusteeship (Lessons from Lebanon)', 41 *Israel Law Review*, 302 (2008).

Geiß, Robin, *Failed States. Die normative Erfassung gescheiterter Staaten*, (Duncker & Humblot, 2005).

Geiß, Robin, 'Armed Violence in Fragile States. Low-intensity Conflicts, Spillover Conflicts, and sporadic Law Enforcement Operations by Third Parties', 91:873 *International Review of the Red Cross*, 127 (2009).

Ghani, Ashraf, Lockhart, Clare and Carnahan, Michael, Overseas Development Institute, Working Paper 253, '*Closing the Sovereignty Gap: An Approach to State-Building*' (2005).

Ghani, Ashraf and Lockhart, Clare, *Fixing Failed States. A Framework for Rebuilding a Fractured World*, (Oxford University Press, 2008).

Gilbert, Christopher L., Vines, David and Powell, A, 'Positioning the World Bank', in Christopher L. Gilbert and David Vines (eds), *The World Bank. Structure and Policies* (Cambridge University Press, 2000).

Giorrello, Marco, 'The Clauses of Democratic Conditionality in the European Union's External Relations', in Carol Cosgrove-Sacks (ed), *Europe, Diplomacy and Development* (Palgrave, 2001).

Giorgetti, Chiara, *A Principled Approach to State Failure. International Community Actions in Emergency Situations*, (Brill, 2010).

Giorgetti, Chiara, 'International Norms and Standards Applicable to Situations of State Fragility and Failure: An Overview', in Hassane Cissé, Daniel D. Bradlow and Benedict Kingsbury (eds), *The World Bank Legal Review. Volume 3. International Financial Institutions and Global Legal Governance* (The World Bank, 2012).

Goldmann, Matthias, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority', in Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010).

Goldmann, Matthias, *Internationale Öffentliche Gewalt. Handlungsformen internationaler Institutionen im Zeitalter der Globalisierung*, (Springer, 2015).

Gomes, Sophie, Lehtinen, Terhi, Sherriff, Andrew and Bossuyt, Jean, European Center for Development Policy Management ECDPM Discussion Paper No. 31, '*The*

EU's Response to Conflict Affected Countries Operational Guidance for the Implementation of the Cotonou Agreement' (2001).

Gordon, Ruth, 'Some Legal Problems with Trusteeship', 28 *Cornell International Law Journal*, 301 (1995).

Gordon, Ruth, 'Saving Failed States: Sometimes A Neocolonialist Notion', 12:6 *American University Journal of International Law and Policy*, 903 (1997).

Grant, Thomas D., 'Defining Statehood: The Montevideo Convention and its Discontents', 37 *Columbia Journal of Transnational Law*, 403 (1999).

Grävingholt, Jö n , Ziaja, Sebastian and Kreibaum, Merle, German Development Institute, Discussion Paper 3/2012, '*State Fragility: Towards a Multi-Dimensional Empirical Typology*' (2012).

Guder, Leonie, *The Administration of Debt Relief by the International Financial Institutions. A Legal Reconstruction of the HIPC Initiative*, (Springer, 2009).

Guder, Leonie, 'Multi-Donor Trust Funds: Instruments of First Choice for Post-Crisis Situations?', *Development Outreach*, 36 (February 2009).

Gunter, Michael, 'The Problem of Ministate Membership in the United Nations System: Recent Attempts Towards a Solution', 12 *Columbia Journal of Transnational Law*, 464 (1973).

Hameiri, Shahar, 'Regulatory Statebuilding and the Transformation of the State', in David Chandler and Timothy Sisk (eds), *Routledge Handbook on International Statebuilding* (Routledge, 2013).

Harley, Georgia, 'To Disburse or Not to Disburse? Strengthening the World Bank's Response to Revolutions and Coups d'Etat', 3:1 *Sanford Journal of Public Policy*, 20 (2012).

Harmer, Adele and Basu Ray, Deepayan, Overseas Development Institute, '*Study on the Relevance and Applicability of the Paris Declaration on Aid Effectiveness in Humanitarian Assistance*' (March 2009).

Harmer, Adele and Macrae, Joanna, Overseas Development Institute, HPG Research Report 18, '*Beyond the Continuum. The Changing Role of Aid Policy in Protracted Crises*', July 2004 (July 2004).

Harris, Dan, Moore, Mick and Schmitz, Hubert, German Development Institute, Discussion Paper 9/2009, '*Country Classifications for a Changing World*' (2009).

Harvey, Paul, Overseas Development Institute, HPG Report 29, '*Towards Good Humanitarian Government. The Role of the Affected State in Disaster Response*' (September 2009).

- Head, John W., 'For Richer or For Poorer: Assessing the Criticisms Direct at the Multilateral Development Banks', 52 *Kansas Law Review*, 241 (2004).
- Hellman, Joel, Surprising Results from Fragile States, World Bank Blog (October 15, 2013), at <http://blogs.worldbank.org/futuredevelopment/surprising-results-fragile-states>
- Helman, Gerald B. and Ratner, Steven R., 'Saving Failed States', 89 *Foreign Policy*, 3 (1992).
- Hendrix, Jonathan E., 'Law Without State: The Collapsed State Challenge to Traditional International Enforcement', 24:2 *Wisconsin International Law Journal*, 587 (2006).
- Herbst, Jeffrey, 'Responding to State Failure in Africa', 21:3 *International Security*, 120 (1996).
- Herbst, Jeffrey, *States and Power in Africa: Comparative Lessons in Authority and Control*, (Princeton University Press, 2000).
- Herdegen, Matthias, 'Der Wegfall effektiver Staatsgewalt: "The failed state"', 34 *Berichte der Deutschen Gesellschaft für Völkerrecht*, 49 (1996).
- Hoffmeister, Frank, 'Das Verhältnis zwischen Entwicklungszusammenarbeit und Gemeinsamer Außen- und Sicherheitspolitik am Beispiel des EG-Stabilitätsinstruments', in Sandra Bartelt (ed), *Entwicklungszusammenarbeit im Recht der Europäischen Union* (Nomos, 2008).
- Holland, Martin, *The European Union and the Third World*, (Palgrave, 2002).
- Hopkins, Raul, Powell, Andrew and Gilbert, Christopher L., 'The World Bank, Conditionality, and the Comprehensive Development Framework', in Christopher L. Gilbert and David Vines (eds), *The World Bank. Structure and Policies* (Cambridge University Press, 2000).
- Hout, Will, 'Between Development and Security: the European Union, Governance and Fragile States', 31:1 *Third World Quarterly*, 147 (2010).
- Hout, Will, 'EU Statebuilding Through Good Governance', in David Chandler and Timothy Sisk (eds), *Routledge Handbook on International Statebuilding* (Routledge, 2013).
- Hudes, Karen and Schlemmer-Schulte, Sabine, 'Accountability in Bretton Woods', 15 *ILSA Journal of International and Comparative Law*, 501 (2008-2009).
- Hughes, Jacob, Hooley, Ted, Hage, Siafa and Ingram, George, The Brookings Institution, *Implementing the New Deal for Fragile States* (July 2014).

Hunter, David, 'International Law and Public Participation in Policy-making at the International Financial Institutions', in Daniel Bradlow and David Hunter (eds), *International Financial Institutions and International Law* (Kluwer, 2010).

Independent Evaluation Group, The World Bank, '*Engaging with Fragile States. An IEG Review of World Bank Support to Low-Income Countries under Stress*' (2006).

Independent Evaluation Group, The World Bank, '*World Bank Assistance to Low-Income Fragile- and Conflict Affected States*' (2013).

Independent Evaluation Group, The World Bank, '*The World Bank's Country Policy and Institutional Assessment*' (June 30, 2009).

Institute of Development Studies, '*An Upside Down View of Governance*' (April 2010).

International Commission on Intervention and State Sovereignty (ICISS), International Development Research Centre, '*Responsibility to Protect*' (2001).

International Crisis Group, Asia Report No 210, '*Aid and Conflict in Afghanistan*' (August 4, 2011).

International Dialogue Secretariat, International Dialogue on Peacebuilding and Statebuilding, '*New Deal Monitoring Report 2014*' (June 2014).

International Law Association, '*Final Report on the Accountability of International Organizations*' (2004).

Ioannidis, Michael and von Bogdandy, Armin, 'Systemic Deficiency in the Rule of Law: What it is, What has been done, What can be done', 51:1 *Common Market Law Review*, 59 (2014).

Jackson, Robert H. and Rosberg, Carl G., 'Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood', 35:1 *World Politics*, 1 (1982).

Jackson, Robert H. and Rosberg, Carl G., 'Sovereignty and Underdevelopment: Juridical Statehood in the African Crisis', 24:1 *The Journal of Modern African Studies*, 1 (1986).

Jackson, Robert Houghwout, *Quasi-states. Sovereignty, International Relations and the Third World*, (Cambridge University Press, 1990).

Jellinek, Georg, *Allgemeine Staatslehre*, (Julius Springer, 1922).

Jessen, Henning, *WTO-Recht und "Entwicklungsländer"*, (Berliner Wissenschafts-Verlag, 2006).

Jones, Bruce and Tortolani, Ben, New York University, Center on International Cooperation, '*Deep Dive on Fragile States*' (August 2013).

Kälin, Walter, 'Guiding Principles on Internal Displacement. Annotations', 32 *ASIL Studies in Transnational Legal Policy*, 1 (2000).

Kaplan, Robert D. , 'The Coming Anarchy. How Scarcity, Crime, Overpopulation, Tribalism, and Disease are Rapidly Destroying The Social Fabric of our Planet', in *The Atlantic*, (February 1994).

Kapur, Devesh and Vines, David, 'The World Bank and Poverty Reduction: Past, Present and Future', in Christopher L. Gilbert and David Vines (eds), *The World Bank. Structure and Policies* (Cambridge University Press, 2000).

Kelsen, Hans, *General Theory of Law and State*, (Harvard University Press, 1949).

Keohane, Robert O., 'Global Governance and Democratic Accountability', in David Held and Mathias Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (Polity Press, 2003).

Keohane, Robert O., 'Political Authority after Intervention: Gradations in Sovereignty', in J.L. Holzgrefe and Robert O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, 2003).

Kerstenetzky, Jaques and Kerstenetzky, Celia Lessa, 'The State as a Developmental Actor: State Forms for Social Transformation', in Bruce Currie-Alder, Ravi Kanbur, Davis Malone and Rohinton Medhora (eds), *International Development. Ideas, Experience, and Prospects* (Oxford University Press, 2014).

Khalfan, Ashfaq, King, Jeff and Thomas, Bryan, Centre for International Sustainable Development Law (CISDL) Working Paper, '*Advancing the Odious Debt Doctrine*' (2003).

Kharas, Homi and Rogerson, Andrew, Overseas Development Institute, '*Horizon 2025. Creative Destruction in the Aid Industry*' (2012).

Killick, Tony, Gunatilaka, Ramani and Marr, Ana, *Aid and the Political Economy of Policy Change*, (Routledge, 1998).

Killinger, Stefanie, *The World Bank's Non-Political Mandate*, (Heymanns, 2003).

Kingsbury, Benedict, 'Sovereignty and Inequality', 9:4 *European Journal of International Law*, 599 (1998).

Kingsbury, Benedict, 'Operational Policies of International Institutions as Part of the Law-Making Process. The World Bank and Indigenous Peoples', in Guy S. Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law. Essays in Honour of Ian Brownlie* (Oxford University Press, 1999).

Kingsbury, Benedict, 'Global Administrative Law in the Institutional Practice of Global Regulatory Governance', in Hassane Cissé, Daniel D. Bradlow and Benedict Kingsbury (eds), *The World Bank Legal Review. Volume 3. International Financial Institutions and Global Legal Governance* (The World Bank, 2012).

Kingsbury, Benedict and Casini, Lorenzo, 'Global Administrative Law Dimensions of International Organizations Law', 6 *International Organizations Law Review*, 319 (2009).

Kingsbury, Benedict and Davis, Kevin, New York University, Hauser Globalization Colloquium Fall 2010 - Session December 1, '*Obligation Overload: Adjusting the Obligations of Fragile or Failed States*' (2010).

Kingsbury, Benedict, Krisch, Nico and Stewart, Richard B., 'The Emergence of Global Administrative Law', 68:3-4 *Law and Contemporary Problems*, 15 (2005).

Klabbers, Jan, *An Introduction to International Institutional Law*, 2nd Edition, (Cambridge University Press, 2009).

Klabbers, Jan, More Soft Statehood... *Opinio Juris* (22 January 2010), at <http://opiniojuris.org/2010/01/22/more-soft-statehood/>.

Klabbers, Jan, Soft Statehood?, *Opinio Juris* (January 20, 2010), at <http://opiniojuris.org/2010/01/20/soft-statehood/>.

Kleffner, Jann K., *Complementarity in the Rome Statute and National Criminal Jurisdiction*, (Oxford University Press, 2007).

Klein, Pierre, 'Internal Law and Rules', in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, November 2006).

Knirsch, Hubert, 'Die Internationalen Finanzinstitutionen und Prekäre Staaten', in Stefani Weiss and Joschka Schmierer (eds), *Prekäre Staatlichkeit und Internationale Ordnung* (2007).

Kokott, Juliane, 'Sovereign Equality', in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, April 2011).

Korhonen, Outi, 'The 'State-Building Enterprise': Legal Doctrine, Progress Narratives and Managerial Governance ', in Brett Bowden, Hilary Charlesworth and Jeremy Farrall (eds), *The Role of International Law in Rebuilding Societies after Conflict. Great Expectations* (Cambridge University Press, 2009).

Koskenmäki, Rikka, 'Legal Implications Resulting from State Failure in Light of the Case of Somalia', 73:1 *Nordic Journal of International Law*, 1 (2004).

Koskenniemi, Martti, 'General Principles: Reflexions on Constructivist Thinking in International Law', *Oikeustiede-Jurisprudentia (Yearbook of the Finnish Law Society)*, 360 (1985).

Koskenniemi, Martti, 'The Politics of International Law', 1:1 *European Journal of International Law*, (1990).

- Koskenniemi, Martti, 'The Wonderful Artificiality of States', 88 *Proceedings of the Annual Meeting (American Society of International Law)*, 22 (1994).
- Koskenniemi, Martti, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization', 8:1 *Theoretical Inquiries in Law*, 9 (2006).
- Koskenniemi, Martti, 'The Politics of International Law - 20 Years Later', 20:1 *European Journal of International Law*, 7 (2009).
- Koutrakos, Panos, 'The Nexus Between the European Union's Common Security and Defence Policy and Development', in Anthony Arnall, Catherine Barnard, Michael Dougan and Eleanor Spaventa (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Oxford University Press, 2011).
- Krasner, Stephen D., *Sovereignty. Organized Hypocrisy*, (Princeton University Press, 1999).
- Krasner, Stephen D. (ed), *Problematic Sovereignty. Contested Rules and Political Possibilities*, (Columbia University Press, 2001).
- Krasner, Stephen D., 'Rethinking the Sovereign State Model', 27 *Review of International Studies*, 17 (2001).
- Kreijen, Gerard (ed), *State, Sovereignty, and International Governance*, (Oxford University Press, 2002).
- Kreijen, Gerard, *State Failure, Sovereignty and Effectiveness. Legal Lessons from the Decolonization of Sub-Saharan Africa*, (Nijhoff, 2004).
- Krieger, Heike, *Das Effektivitätsprinzip im Völkerrecht*, (Duncker & Humblot, 2000).
- Kuon, Dorothee, *Good Governance im Europäischen Entwicklungsrecht* (Nomos, 2010).
- Ladwig, Bernd and Rudolf, Beate, 'International Legal and Moral Standards of Good Governance in Fragile States', in Thomas Risse (ed), *Governance Without a State: Policies and Politics in Areas of Limited Statehood* (Columbia University Press, 2011).
- Lancaster, Carol, 'The World Bank in Africa since 1980: The Politics of Structural Adjustment Lending', in Devesh Kapur, John Lewis and Richard Webb (eds), *The World Bank. Its First Half Century. Volume 2: Perspectives* (Brookings Institution, 1997).
- Larson, Greg, Pritchett, Lant and Biar Ajak, Peter Harvard Center for International Development (CID) Working Paper No. 268, 'South Sudan's Capability Trap: Building a State with Disruptive Innovation' (October 2013).

Leftwich, Adrian, 'Bringing Politics Back In: Towards a Model of the Developmental State', 31:3 *Journal of Development Studies*, 400 (1995).

Leftwich, Adrian, *States of Development. On the Primacy of Politics in Development*, (Blackwell, 2000).

Legal Vice Presidency, The World Bank, '*Annual Report FY 2011: The World Bank and the Rule of Law*' (2011).

Leidenmühler, Franz, *Kollabierter Staat und Völkerrechtsordnung. Zur Aktualität der Westfälischen Ordnung, entwickelt an Fragen des Wegfalls effektiver Staatsgewalt*, (NWV Verlag, 2011).

Leipziger, Danny, 'The Role and Influence of International Financial Institutions', in Bruce Currie-Alder, Ravi Kanbur, Davis Malone and Rohinton Medhora (eds), *International Development. Ideas, Experience, and Prospects* (Oxford University Press, 2014).

Lemay-Hébert, Nicolas, 'Statebuilding without Nation-building? Legitimacy, State Failure and the Limits of the Institutional Approach', 3:1 *Journal of Intervention and Statebuilding*, 21 (2009).

Leroy, Anne-Marie, 'The Bank's Engagement in the Criminal Justice Sector and the Role of Lawyers in the "Solutions Bank": An Essay', in Legal Vice Presidency (ed), *Annual Report FY 2013. The World Bank's Engagement in the Criminal Justice Sector and the Role of Lawyers in the "Solutions Bank"* (The World Bank 2013).

Levy, Brian and Kpundeh, Sahr (eds), *Building State Capacity in Africa. New Approaches, Emerging Lessons*, (World Bank Institute, 2004).

Liebach, Ingo, *Die unilaterale humanitäre Intervention im "zerfallenen Staat" ("failed state")*, (Heymann, 2004).

Locke, John, *Two Treatises of Government* (1689), (University Press, 1960).

Mackie, James and Zinke, Julia, European Centre for Development Policy Management, Discussion Paper No. 64A, '*When Agreement Breaks Down, What Next? The Cotonou Agreement's Article 96 Consultation Procedure*' (2005).

Macrae, Joanna, Shepherd, Andrew, Morrissey, Oliver, Harmer, Adele, Anderson, Ed, Piron, Laure-Hélène, McKay, Andy, Cammack, Diana and Kyegombe, Nambusi, Overseas Development Institute, '*Aid to 'Poorly Performing' Countries: A Critical Review of Debates and Issues*' (July 2004).

Magiera, Siegfried, 'Governments', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* September 2007).

Mallaby, Sebastian, *The World's Banker. A Story of Failed States, Financial Crises, and the Wealth and Poverty of Nations*, (Penguin Press, 2004).

- Marauhn, Thilo, 'The Promotion of Good Governance in Fragile States', in Kerstin Kötschau and Thilo Marauhn (eds), *Good Governance and Developing Countries* (Peter Lang, 2007).
- Marc, Alexandre, Willman, Alys, Aslam, Ghazi, Rebosio, Michelle and Balasuriya, Kanishka, *Societal Dynamics and Fragility. Engaging Societies in Responding to Fragile Situations*, (The World Bank, 2013).
- Marcussen, Martin, 'OECD Governance through Soft Law', in Ulrika Mörtz (ed), *Soft Law in Governance and Regulation. An Interdisciplinary Analysis* (Edward Elgar, 2004).
- Marshall, Monty G. and Cole, Benjamin R., Center for Systemic Peace, '*Global Report 2011. Conflict, Governance, and State Fragility*' (2011).
- Martenczuk, Bernd, 'From Lomé to Cotonou: The ACP-EC Partnership Agreement in a Legal Perspective', 5 *European Foreign Affairs Review*, 461 (2000).
- Martha, Rutsel, 'Mandate Issues in the Activities of the International Fund for Agricultural Development (IFAD)', 6 *International Organizations Law Review*, 447 (2009).
- Martinussen, John, *Society, State and Market. A Guide to Competing Theories of Development*, (Zed Books, 1997).
- Mata, Javier Fabra and Ziaja, Sebastian United Nations Development Programme (UNDP) and German Development Institute, '*Users' Guide on Measuring Fragility*' (2009).
- Matar, Hisham, 'The killing of Abdelsalam al-Mismari, and the triumph of fear in Libya', in *The Guardian*, (July 30, 2013).
- Mazarr, Michael J. , 'The Rise and Fall of the Failed-State Paradigm. Requiem for a Decade of Distraction', in *Foreign Affairs*, (January/February 2014).
- McLoughlin, Claire, 'When Does Service Delivery Improve the Legitimacy of a Fragile or Conflict-Affected State?', Forthcoming in *Governance*, (2014).
- McLoughlin, Claire Governance and Social Development (GSD) Resource Center, '*Topic Guide on Fragile States*' (2010).
- Menocal, Alina Rocha, 'Aid in Fragile States', in David Chandler and Timothy Sisk (eds), *Routledge Handbook on International Statebuilding* (Routledge, 2013).
- Milliken, Jennifer and Krause, Keith, 'State Failure, State Collapse and State Reconstruction: Concepts, Lessons and Strategies', in Jennifer Milliken and Keith Krause (eds), *State Failure, Collapse and Reconstruction* (Blackwell, 2005).
- Mingst, Karen A., *Politics and the African Development Bank*, (University Press of Kentucky, 1990).

- Minnerop, Petra, 'The Classification of States and the Creation of Status within the International Community', 7 *Max Planck Yearbook of United Nations Law*, 79 (2003).
- Mommsen, Wolfgang J. and Schluchter, Wolfgang (eds), *Gesamtausgabe Max Weber. Wissenschaft als Beruf, 1917/1919 - Politik als Beruf, 1919*, (Mohr, 1992).
- Moore, Mick, 'Declining to Learn from the East? The World Bank on 'Governance and Development'', 24:1 *IDS Bulletin*, (1993).
- Mosler, Matthias, *Finanzierung durch die Weltbank. Grundlegung und anwendbares Recht der vertraglichen Instrumente*, (Duncker & Humblot, 1987).
- Mosley, Paul, Harrigan, Jane and Toye, John, *Aid and Power. The World Bank and Policy-based Lending*, 2 (Routledge, 1991).
- Moss, Todd, Pettersson, Gunilla and van de Walle, Nicolas, 'An Aid-Institutions Paradox? A Review Essay on Aid Dependency and State Building in Sub-Saharan Africa', *Center for Global Development Working Paper 74*, (January 2006).
- Muggah, Robert, Sisk, Timothy, Piza-Lopez, Eugenia, Salmon, Jago and Keuleers, Patrick, UNDP, '*Governance for Peace. Securing the Social Contract*' (2012).
- Murphy, Craig N., *The United Nations Development Programme: A Better Way?*, (Cambridge University Press 2009).
- Muscat, Robert, The World Bank, '*Conflict and Reconstruction. Roles for the World Bank*' (1995).
- Nay, Olivier, 'International Organisations and the Production of Hegemonic Knowledge: How the World Bank and the OECD helped invent the Fragile State Concept', 35:2 *Third World Quarterly*, 210 (2014).
- Nesbitt, Michael, 'The World Bank and De Facto Governments. A Call for Transparency in the Bank's Operational Policy', 32 *Queen's Law Journal*, 641 (2007).
- Nettl, John Peter, 'The State as a Conceptual Variable', 20:4 *World Politics*, 559 (1968).
- Newman, Edward, 'Failed States and International Order: Constructing a Post-Westphalian World', 90:3 *Contemporary Security Policy*, 421 (2009).
- Nieuwenhuys, Eva, 'Development Aid by Tank Viewed in the Light of the Globalisation of the Western Development Model', in Bruce Currie-Alder, Ravi Kanbur, Davis Malone and Rohinton Medhora (eds), *International Development. Ideas, Experience, and Prospects* (Oxford University Press, 2014).
- Nooruddin, Irfan and Flores, Thomas Edward, 'Financing the Peace: Evaluating World Bank Post-Conflict Assistance Programs', 4 *Review of International Organizations*, 1 (2009).

- OECD, *'The Challenge of Capacity Development. Working Towards Good Practice'* (2006).
- OECD, *'Inside the DAC'* (2009-2010).
- OECD, *'The State's Legitimacy in Fragile Situations. Unpacking Complexity'* (2010).
- OECD, *'Managing Risks in Fragile and Transitional Contexts. The Price of Success?'* (2011).
- OECD, *'Supporting Statebuilding in Situations of Conflict and Fragility: Policy Guidance'* (2011).
- OECD, *'Ensuring Fragile States Are Not Left Behind. 2013 Factsheet on Resource Flows and Trends'* (2013).
- OECD, *'Fragile States 2013. Resource Flows and Trends in a Shifting World'* (2013).
- OECD, *'Fragile States 2014. Domestic Revenue Mobilization in Fragile States'* (2014).
- OECD, *'Think Global, Act Global: Confronting Global Factors that Influence Conflict and Fragility'* (September 2012).
- Oeter, Stefan, 'Regieren im 21. Jahrhundert: Staatlichkeit und internationales System', in Stefani Weiss and Joscha Schmierer (eds), *Prekäre Staatlichkeit und Internationale Ordnung* (Verlag für Sozialwissenschaften, 2007).
- Oeter, Stefan, 'Prekäre Staatlichkeit und die Grenzen internationaler Verrechtlichung', in Regina Kreide and Andreas Niederberger (eds), *Transnationale Verrechtlichung. Nationale Demokratien im Kontext globaler Politik* (Campus, 2008).
- Operations Evaluation Department, African Development Bank, *'Evaluation of the Assistance of the African Development Bank to Fragile States'* (2012).
- Operations Evaluation Department, The World Bank, *'Capacity Building in Africa: An OED Evaluation of World Bank Support.'* (April 2005).
- Oppenheim, Lassa, *International Law. Vol. 1 Peace*, 8th, (Longmans, 1955).
- Orford, Anne, 'Moral Internationalism and the Responsibility to Protect', 24:1 *European Journal of International Law*, 83 (2013).
- Oxford Policy Management and The IDL Group, *'Evaluation of the Implementation of the Paris Declaration: Thematic Study. The Applicability of the Paris Declaration in Fragile and Conflict-affected Situations.'* (August 2008).
- Pahuja, Sundhya, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality*, (Cambridge University Press, 2011).

Pantuliano, Sara, Donor-Driven Technical Fixes Failed South Sudan: It's Time to Get Political, December 9, 2014 (Think Africa Press), at <http://thinkafricapress.com/south-sudan/donor-driven-technical-fixes-failed-time-put-politics-heart-nation-building-project-kiir-machar-garang>.

Parks, Thomas, Colletta, Nat and Oppenheim, Ben, The Asia Foundation, ' *The Contested Corners of Asia - Subnational Conflict and International Development Assistance* ' (2013).

Patrick, Stewart, *Weak Links: Fragile States, Global Threats, and International Security*, (Oxford University Press, 2011).

Pauwelyn, Joost, 'Is it International Law or Not, and Does It Even Matter?', in Jan Wouters, Joost Pauwelyn and Ramses A. Wessel (eds), *Informal International Lawmaking* (Oxford University Press, 2012).

Pender, John, 'Country Ownership: The Evasion of Donor Accountability', in Christopher J. Bickerton, Philip Cunliffe and Alexander Gourevitch (eds), *Politics without Sovereignty. A Critique of Contemporary International Relations* (UCL Press, 2007).

Pereira, L. Ribeiro, Friedrich Eberst Stiftung (FES), ' *What's Peace Got To Do With It? Advocating Peace in the Post-2015 Sustainable Development Agenda* ' (September 2014).

Peters, Anne, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 *Leiden Journal of International Law*, 579 (2006).

Peters, Anne, 'Humanity as the α and Ω of Sovereignty', 20:3 *The European Journal of International Law*, 513 (2009).

Peters, Anne, 'Statehood after 1989: 'Effectivités' between Legality and Virtuality', in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law* (Oxford University Press, 2010).

Presidency, Legal Vice, The World Bank, ' *Annual Report FY 2014. Legal Aspects of the World Bank's Involvement in the Security Sector* ' (2014).

Pritchett, Lant, Woolcock, Michael and Andrews, Matt, Center for Global Development Working Paper 234, ' *Capability Traps? The Mechanisms of Persistent Implementation Failure* ' (December 2010).

Putzel, James, Crises States Research Center, ' *Why Development Actors Need a Better Definition of 'State Fragility'* ' (2010).

Putzel, James and DiJohn, Jonathan, LSE Crisis States Research Centre ' *Meeting the Challenges of Crisis States* ' (2012).

- Ragazzi, Maurizio, 'The Role of the World Bank in Conflict-Afflicted Areas', 95 *American Society of International Law Proceedings*, 240 (2001).
- Ragazzi, Maurizio, 'World Bank Group', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, March 2010).
- Rajamani, Lavanya, *Differential Treatment in International Environmental Law*, (Oxford University Press, 2006).
- Rajamani, Lavanya, 'The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law', 88:3 *International Affairs*, 605 (2012).
- Raustiala, Kal, 'Rethinking the Sovereignty Debate in International Economic Law', 6:4 *Journal of International Economic Law*, 841 (2003).
- Reinisch, August, 'Securing the Accountability of International Organizations', 7 *Global Governance*, 131 (2001).
- Reisman, Michael, 'Sovereignty and Human Rights in Contemporary International Law', 84 *American Journal of International Law*, 866 (1990).
- Richardson, Henry J., '"Failed States", Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations', 10 *Temple International and Comparative Law Journal*, 1 (1996).
- Riegner, Michael, Global Administrative Law Working Papers 6/2012, '*Measuring the Good Governance State: A Legal Reconstruction of the World Bank's "Country Policy and Institutional Assessment"*' (2012).
- Riegner, Michael and Dann, Philipp, 'Foreign Aid Agreements', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, May 2011).
- Rigo Sureda, A., 'Informality and Effectiveness in the Operation of the International Bank for Reconstruction and Development', 6:3 *Journal of International Economic Law*, 565 (2003).
- Rigo Sureda, Andrés, 'The Law Applicable to the Activities of International Development Banks', 308 *Recueil des Cours*, 13 (2004).
- Roodmann, David, 'The Anarchy of Numbers: Aid, Development and Cross-Country Empirics', 21:2 *World Bank Economic Review* 255 (2007).
- Rotberg, Robert I. (ed), *State Failure and State Weakness in a Time of Terror*, (World Peace Foundation, 2003).
- Rotberg, Robert I. (ed), *When States Fail. Causes and Consequences*, (Princeton University Press, 2004).
- Rousseau, Jean-Jacques, *Du Contrat Social* (1762), (Rieder, 1922).

- Sands, Philippe Q. C. and Klein, Pierre, *Bowett's Law of International Institutions*, (Sweet & Maxwell, 2001).
- Sarfaty, Galit A., 'The World Bank and the Internationalization of Indigenous Rights Norms', 114:7 *Yale Law Journal*, 1791 (2004-2005).
- Sattelberger, Julia, '*Authority Through Regulation (Working Title)*' (forthcoming).
- Saul, Matthew, 'From Haiti to Somalia: The Assistance Model and the Paradox of State Reconstruction in International Law', 11:1 *International Community Law Review*, 119 (2009).
- Saul, Matthew, 'Local Ownership of Post-Conflict Reconstruction in International Law: The Initiation of International Involvement', *Journal of Conflict & Security Law*, 1 (2011).
- Schachter, Oscar, 'The Decline of the Nation-State and its Implications for International Law', 36:7 *Columbia Journal of Transnational Law*, 7 (1998).
- Scharf, Michael P., 'Earned Sovereignty. Juridicial Underpinnings', 31 *Denver Journal of International Law and Policy*, 373 (2002-2003).
- Schermers, Henry G., 'Different Aspects of Sovereignty', in Gerard Kreijen (ed), *State, Sovereignty, and International Governance* (Oxford University Press, 2002).
- Schermers, Henry G. and Blokker, Niels, *International Institutional Law. Unity within Diversity*, 4. rev., (Nijhoff, 2003).
- Schneckener, Ulrich, 'Fragile Staaten als Problem der internationalen Politik', 3 *Nord-Süd Aktuell*, 510 (2004).
- Schröder, Hinrich, *Die völkerrechtliche Verantwortlichkeit im Zusammenhang mit failed und failing States*, (Nomos, 2007).
- Sen, Amartya, *Development as Freedom*, (Oxford University Press, 2001).
- Shaw, Malcolm N., *International Law*, 5th, (Cambridge University Press, 2003).
- Shelton, Dinah, *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*, (Oxford University Press, 2003).
- Sherman, Jake, Gleason, Megan M., Sidhu, W.P.S. and Jones, Bruce New York University Center on International Cooperation, '*Engagement on Development and Security: New Actors, New Debates*' (September 2011).
- Shihata, Ibrahim F. I., *The World Bank in a Changing World*, 2 (Nijhoff, 1995).
- Shihata, Ibrahim F. I., 'The Dynamic Evolution of International Organizations: The Case of the World Bank', 2 *Journal of the History of International Law*, 217 (2000).

- Shihata, Ibrahim F. I., *The World Bank in a Changing World*, 3 (Nijhoff, 2000).
- Shihata, Ibrahim F. I., *The World Bank Legal Papers*, (Kluwer Law International, 2000).
- Shihata, Ibrahim F. I., Gruss, Hans-Jürgen and Abushakra, I. Hadi, 'Legal Aspects of the World Bank's Assistance to the West Bank and the Gaza Strip':7 *The Palestine Yearbook of International Law*, 19 (1992).
- Silva, Mario, 'Somalia: State Failure, Piracy, and the Challenge to International Law', 50:3 *Virginia Journal of International Law Association*, 553 (2010).
- Simpson, Gerry J., *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order*, (Cambridge University Press, 2004).
- Skogly, Sigrun I., *The Human Rights Obligations of the World Bank and the International Monetary Fund*, (Cavendish, 2001).
- Slaughter, Anne-Marie, 'International Law in a World of Liberal States', 6 *European Journal of International Law*, 503 (1995).
- Slaughter, Anne-Marie, *A New World Order*, (Princeton University Press, 2004).
- Spiliopoulou Akermark, Sia, 'Soft Law and International Financial Institutions – Issues of Hard and Soft Law from a Lawyer's Perspective', in Ulrika Mörtz (ed), *Soft Law in Governance and Regulation. An Interdisciplinary Analysis* (Edward Elgar, 2004).
- Stacy, Helen M., 'Relational Sovereignty', 99 *American Society of International Law (ASIL) Proceedings*, 396 (2005).
- Stahn, Carsten, 'The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis', 5 *Max Planck Yearbook of United Nations Law*, 105 (2001).
- Stahn, Carsten, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', 101:1 *The American Journal of International Law*, 99 (2007).
- Stahn, Carsten, *The Law and Practice of International Territorial Administration. Versailles to Iraq and Beyond*, 1. publ., (Cambridge University Press, 2008).
- Starr, Harvey, 'Introduction to the CMPS Special Issue on Failed States', 25:4 *Conflict Management and Peace Science*, 281 (2008).
- Steele, Jonathan, 'The West's Legacy in Afghanistan: So Much for so Little', in *The Guardian*, (January 15, 2014).
- Steiger, Heinhard, 'Geht das Zeitalter des souveränen Staates zu Ende?', 41 *Der Staat*, 331 (2002).

Stern, Nicolas and Ferreira, Francisco, 'The World Bank as “Intellectual Actor”', in Devesh Kapur, John Lewis and Richard Webb (eds), *The World Bank. Its First Half Century. Volume 2: Perspectives* (Brookings Institution, 1997).

Stone, Christopher D., 'Common but Differentiated Responsibilities in International Law', 98 *American Journal of International Law*, 276 (2004).

Sureda, Andres Rigo, 'The World Bank and Institutional Innovation', in Edith Brown Weiss and Ibrahim F. I. Shihata (eds), *The World Bank, International Financial Institutions, and the Development of International Law*. (American Society of International Law, 1999).

Suzuki, Eisuke, 'Regional Development Banks', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, April 2011).

Taki, Hiroshi, 'Effectiveness', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, February 2013).

Talmon, Stefan, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, (Clarendon Press, 1998).

Teichova, Alice and Matis, Herbert, 'Introduction', in Alice Teichova and Herbert Matis (eds), *Nation, State and the Economy in History* (Cambridge University Press, 2003).

The White House, 'Fact Sheet: U.S. Global Development Policy' (September 22, 2010).

The World Bank, 'Sub-Saharan Africa: From Crisis to Sustainable Growth. A Long-Term Perspective Study' (1989).

The World Bank, 'Post-Conflict Reconstruction. The Role of the World Bank' (1998).

The World Bank, 'The Role of the World Bank in Conflict and Development. An Evolving Agenda' (2004).

The World Bank, 'Guidance Note on Bank Multi-Stakeholder Engagement' (2009).

The World Bank, 'Additions to IDA Resources: Sixteenth Replenishment - IDA 16: Delivering Development Results' (2011).

The World Bank, 'World Development Report: Conflict, Security, and Development' (2011).

The World Bank, '2012 Development Policy Lending Retrospective' (2013).

The World Bank, 'South Sudan - Interim Strategy Note for FY2013-2014' (2013), at <http://documents.worldbank.org/curated/en/2013/01/17234245/south-sudan-interim-strategy-note-fy2013-2014>.

The World Bank, '*Annual Report 2014*' (2014).

The World Bank, '*World Development Report. Risk and Opportunity. Managing Risk for Development*' (2014).

The World Bank, '*A New Instrument to Advance Development Effectiveness: Program-for-Results Financing*' (December 29, 2011).

The World Bank, '*Good Practice Note for Development Policy Lending. Development Policy Operations and Program Conditionality in Fragile States*' (June 7, 2005).

The World Bank, '*Interim Strategy Note for Somalia for the period of FY 08-09*' (June 21, 2007).

The World Bank, '*IDA 15. Operational Approaches and Financing in Fragile States*' (June 2007).

The World Bank, '*Additions to IDA Resources: Seventeenth Replenishment - IDA17: Maximizing Development Impact*' (March 25, 2014).

The World Bank, '*IDA 17. IDA's Support to Fragile and Conflict-Affected States*' (March 2013).

The World Bank, '*State and Peacebuilding Fund Progress Report*' (May 21, 2009).

The World Bank, '*Interim Strategy Note for the Federal Republic of Somalia*' (November 11, 2013).

The World Bank, The World Bank, '*IDA15 Mid-Term Review. IDA's Support to Fragile and Conflict-Affected Countries: Progress Report 2007-2009*' (November 2009).

The World Bank, '*The World Bank's Safeguard Policies. Proposed Review and Update – Approach Paper*' (October 2012).

The World Bank, '*Implementation Arrangements for Allocating IDA Resources to Countries Facing "Turn-around" Situations. Background Note*' (October 2013).

The World Bank and African Development Bank, '*Providing Budget Aid in Situations of Fragility: A World Bank - African Development Bank Common Approach Paper*' (2011).

Thürer, Daniel, '*Der Wegfall effektiver Staatsgewalt: "The failed state"*', 34 *Berichte der Deutschen Gesellschaft für Völkerrecht*, 9 (1996).

Thürer, Daniel, '*The "Failed State" and International Law*', 81:836 *International Review of the Red Cross*, 731 (1999).

Thürer, Daniel and Burri, Thomas, 'Self-Determination', in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008).

Tietje, Christian, 'Comment on the Contributions by Jochen von Bernstorff and by Maja Smrkolj', in Armin von Bogdandy, Rüdiger Wolfrum, Philipp Dann, Matthias Goldmann and Jochen von Bernstorff (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010).

Tilly, Charles (ed), *The Formation of National States in Western Europe*, (Princeton University Press, 1975).

Tomuschat, Christian, *International Law: Ensuring the Survival of Mankind on the Eve of a new Century. General Course on Public International Law (Volume 281)*, (Brill, 2001).

Toye, John and Toye, Richard, UN Research Institute for Social Development, Programme Paper Series 11, 'The World Bank as a Knowledge Agency' (November 2005).

Tran, Mark, 'South Sudan failed by misjudgment of international community, says UN chief', in *The Guardian*, (January 22, 2014).

Traub, James, 'Think Again: Failed States', in *Foreign Policy*, (June 20, 2011).

UNDP, 'Somalia Human Development Report 2012: Empowering Youth for Peace and Development' (2012).

UNDP, 'Changing With the World. UNDP Strategic Plan 2014-2017' (2014).

United Nations, 'A New Global Partnership. Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda' (2013).

van Houten, Pieter, 'The World Bank's (Post-)Conflict Agenda: The Challenge of Integrating Development and Security', 20:4 *Cambridge Review of International Affairs*, 639 (2007).

Verdross, Alfred and Simma, Bruno, *Universelles Völkerrecht: Theorie und Praxis*, (Duncker & Humblot, 1984).

Vidmar, Jure, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice*, (Oxford University Press, 2013).

Vierck, Leonie and Dann, Philipp, 'Paris Declaration on Aid Effectiveness (2005)/Accra Agenda for Action (2008)', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, April 2011).

Visman, Emma, European Center for Development Policy Management, ECDPM Working Paper Number 66, 'Cooperation with Politically Fragile Countries: Lessons from EU Support to Somalia ' (1997).

von Bernstorff, Jochen, 'Procedures of Decision-Making and the Role of Law in International Organizations', in Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010).

von Bogdandy, Armin, 'Prolegomena zu Prinzipien internationalisierter und internationaler Verwaltung', in Hans-Heinrich Trute, Thomas Gross, Hans-Christian Röhl and Christoph Möllers (eds), *Allgemeines Verwaltungsrecht - Zur Tragfähigkeit eines Konzepts* (Mohr Siebeck, 2008).

von Bogdandy, Armin, 'General Principles of International Public Authority: Sketching a Research Field', in Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010).

von Bogdandy, Armin, 'The European Lesson for International Democracy: The Significance of Articles 9-12 EU Treaty for International Organizations', 23:2 *European Journal of International Law*, 315 (2012).

von Bogdandy, Armin and Goldmann, Matthias, 'The Exercise of International Public Authority through National Policy Assessment. The OECD's PISA Policy as a Paradigm for a New International Standard Instrument', 5:2 *International Organizations Law Review*, 241 (2009).

von Bogdandy, Armin, Häußler, Stefan, Hanschmann, Felix and Utz, Raphael 'State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches', 9 *Max Planck Yearbook of United Nations Law*, 579 (2005).

von Bogdandy, Armin, Dann, Philipp and Goldmann, Matthias, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', in Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010).

von Engelhardt, Marie, 'Opportunities and Challenges of a Soft Law Track to Economic and Social Rights. The Case of the Voluntary Guidelines on the Right to Food', 42:4 *Verfassung und Recht in Übersee*, 502 (2009).

von Engelhardt, Marie, 'Reflections on the Role of the State in the Legal Regimes of International Aid', 71:3 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 451 (2011).

von Engelhardt, Marie, 'Die Völkerrechtswissenschaft und der Umgang mit Failed States. Zwischen Empirie, Dogmatik und postkolonialer Theorie', 2 *Verfassung und Recht in Übersee*, 222 (2012).

von Trotha, Trutz, 'The "Andersen Principle": On the Difficulty of Truly Moving Beyond State-Centrism', in Martina Fischer and Beatrix Schmelzle (eds), *Building*

Peace in the Absence of States - Challenging the Discourse on State Failure (Berghof Research Centre for Constructive Conflict Management, Dialogue Series 8, 2009).

Wade, Robert, 'Greening the Bank: The Struggle over the Environment, 1970-1995', in Devesh Kapur, John Lewis and Richard Webb (eds), *The World Bank. Its First Half Century. Volume 2: Perspectives* (Brookings Institution, 1997).

Walton, Oliver, Governance and Social Development (GSD) Resource Center, 'Helpdesk Research Report: Trust Funds in Fragile and Low Capacity States' (2011).

Weiler, Joseph H. H., 'Editorial. Differentiated Statehood? 'Pre-States'? Palestine@the UN', 24:1 *European Journal of International Law*, 1 (2013).

White, John, *Regional Development Banks. The Asian, African and Inter-American Development Banks*, (Praeger Publishers, 1972).

Whitfield, Lindsay and Fraser, Alastair, 'Introduction: Aid an Sovereignty', in Lindsay Whitfield (ed), *The Politics of Aid. African Strategies for Dealing with Donors* (Oxford University Press, 2009).

Wilde, Ralph, 'The Skewed Responsibility Narrative of the "Failed States" Concept', 9:2 *ILSA Journal of International & Comparative Law*, 425 (2003).

Wilde, Ralph, *International Territorial Administration. How Trusteeship and the Civilizing Mission Never Went Away*, 1. publ., (Oxford University Press, 2008).

Williams, David, 'Aid and Sovereignty: Quasi-states and the International Financial Institutions', 26:4 *Review of International Studies*, 557 (2000).

Williamson, John, Institute for International Economics, '*Latin American Adjustment: How Much Has Happened?*' (1990).

Wolfrum, Rüdiger (ed), *The Max Planck Encyclopedia of Public International Law*, (Oxford University Press, 2008).

Woods, Ngaire, 'The Challenges of Multilateralism and Governance', in Christopher L. Gilbert and David Vines (eds), *The World Bank. Structure and Policies* (Cambridge University Press, 2000).

Woolcock, Michael, UNU WIDER Working Paper 2014/097, '*Engaging with Fragile and Conflict-affected States. An Alternative Approach to Theory, Measurement and Practice*' (July 2014).

Wouters, Jan, Pauwelyn, Joost and Wessel, Ramses A. (eds), *Informal International Lawmaking*, (Oxford University Press, 2012).

Wyeth, Vanessa, 'Knights in Fragile Armor: The Rise of the "G7+"', 18:1 *Global Governance*, 7 (2012).

Yannis, Alexandros, 'State Collapse and Prospects for Political Reconstruction and Democratic Governance in Somalia', 5 *African Yearbook of International Law*, 23 (1997).

Yannis, Alexandros, 'The Concept of Suspended Sovereignty in International Law and its Implications in International Politics', 13:5 *European Journal of International Law*, 1037 (2002).

Young, Crawford, 'The End of the Post-Colonial State in Africa? Reflections on the Changing African Political Dynamics', 103 *African Affairs*, 23 (2004).

Zartman, Ira William, 'Introduction: Posing the Problem of State Collapse', in Ira William Zartman (ed), *Collapsed States. Disintegration and Restoration of Legitimate Authority* (Lynne Rienner Publishers, 1994).

Zaum, Dominik, *The Sovereignty Paradox: The Norms and Politics of International State-Building*, (Oxford University Press, 2005).

Zoellick, Robert B., 'Fragile States: Securing Development', 50:6 *Survival*, 67 (2009).